Supreme Court, U. S.
FILED
NOV 11 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1977

No. 76, Original

STATE OF CALIFORNIA,
Plaintiff,

vs.

STATE OF TEXAS,
Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT
and
MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

MYRON SIEDORF
Chief Inheritance Tax Attorney
JAMES R. BIRNBERG
Assistant Inheritance Tax Attorney
107 South Broadway
Los Angeles, California 90012

JEROME B. FALK, JR.
STEVEN L. MAYER
HOWARD, PRIM, RICE, NEMEROVSKI,
CANADY & POLLAK
A Professional Corporation
650 California Street, Suite 2900
San Francisco, California 94108
Telephone: (415) 434-1600
Attorneys for Plaintiff

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

Subject Index

	Page
Motion for leave to file complaint	1
Memorandum of plaintiff in support of motion for leave to file complaint	3
Jurisdiction	3
Statement	4
Conclusion	16
Complaint	17
I. Jurisdiction	17
II. Parties	18
III. Factual background	19
IV. Pending proceedings	20
V. Controversy between states	23

Table of Authorities Cited

Cases

	Pages
Arizona v. New Mexico, 425 U.S. 794 (1976)	14
Estate of Dorrance, 287 U.S. 660 (1932), 288 U.S. 617 (1933) and 298 U.S. 678 (1936)	13
Hill v. Martin, 296 U.S. 393 (1935) (per curiam), affirming 12 F. Supp. 746 (1935)	13
Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363	4
Illinois v. City of Milwaukee, 406 U.S. 91 (1972)	14
Massachusetts v. Missouri, 308 U.S. 1 (1939)	14
Nevin v. Martin, 307 U.S. 615 (1939) (per curiam), affirming 22 F. Supp. 836 (D.N.J. 1938)	12
Ohio v. Wyandotte Chemicals Co., 401 U.S. 493 (1971)	14
Riley v. New York Trust Co., 315 U.S. 343 (1941)	12
Texas v. Florida, 306 U.S. 398 (1938)	4, 7, 8, 9, 10, 11, 12, 15, 16
Tumey v. Ohio, 273 U.S. 510 (1927)	11
United States v. Louisiana, 339 U.S. 699 (1950)	16
Ward v. City of Monroeville, 409 U.S. 57 (1973)	11
Washington v. General Motors Corp., 406 U.S. 109 (1972)	14
Worcester County Trust Co. v. Riley, 302 U.S. 292 (1937)	12, 13

Codes

California Probate Code:	
Section 605	21
California Revenue and Taxation Code:	
Section 13307	5
Section 13308	5
Section 13309	5
Section 13406	5
Sections 14197-14197.13	13
Sections 14199-14199.13	13
Sections 14501 et seq.	21

Constitutions

United States Constitution:	Pages
Article III, Section 2	3, 11

Statutes

8 Del. C. § 169	5, 22
Tex. Tax-Gen. Ann.:	
Article 14.05	5
Article 14.12	6
26 U.S.C.:	
Section 2001	6
Section 2011	6
Section 2032	23
28 U.S.C.:	
Section 1251(a)(1)	3, 14, 17
Section 1251(b)(2)	14
Section 1257(2)	14
Section 1341	13
Section 1872	16
Section 2283	13

Other Authorities

Hart & Wechsler, the Federal Courts and the Federal System 287 ¶(7) (2d ed. 1973)	14
CCH Inheritance, Estate & Gift Tax Reporter ¶12,035	13
Reese, Does Domicile Bear a Single Meaning? 55 Col. L. Rev. 589 (1955)	10
The Hughes Estate (Armadillo Press, La Porte, Texas)	4

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. , Original

STATE OF CALIFORNIA,
Plaintiff,

vs.

STATE OF TEXAS,
Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT

The State of California, by its duly authorized representative, Kenneth Cory, Controller, asks leave of the Court to file its Complaint against the State of Texas submitted herewith.

Dated: November 11, 1977

Respectfully,

MYRON SIEDORF
Chief Inheritance Tax Attorney
JAMES R. BIRNBERG
Assistant Inheritance Tax Attorney
JEROME B. FALK, JR.
STEVEN L. MAYER
HOWARD, PRIM, RICE, NEMEROVSKI,
CANADY & POLLAK
A Professional Corporation
Attorneys for Plaintiff

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. , Original

STATE OF CALIFORNIA,
Plaintiff,

VS.

STATE OF TEXAS,
Defendant.

MEMORANDUM OF PLAINTIFF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

JURISDICTION

The original jurisdiction of the Court is invoked pursuant to Article III, Section 2 of the Constitution of the United States and 28 U.S.C. §1251(a)(1). The controversy concerns inconsistent claims by California and Texas that Howard R. Hughes died domiciled within their respective borders. If each state successfully imposes a death tax in its own courts, the resulting state and federal tax claims will exceed the net assets of the estate by a substantial

margin. Jurisdiction to resolve inconsistent claims of domicile for state inheritance tax purposes in this unique circumstance was established in *Texas v. Florida,* 306 U.S. 398 (1938). The proposed Complaint of California in this case seeks only an adjudication of the adverse claim of Texas that decedent was its domiciliary for inheritance tax purposes, all other issues pertaining to the probate of the estate being proper subjects for local adjudication.

STATEMENT

On April 5, 1976, Howard Robard Hughes, Jr. ("decedent") died in a chartered jet which was rushing him from Mexico to a hospital in Texas. His sizeable estate is now the subject of probate proceedings pending in California, Texas, and Nevada, each of which was arguably the state of Hughes' domicile.[1] The uncertainties concerning domicile, combined with numerous other unresolved questions not presented herein, have generated a tangle of litigation which may well become "a 20th-century sequel to Bleak House" (*Hughes Tool Co. v. Trans World Airlines,* 409 U.S. 363, 393 (Burger, C.J., dissenting)).[2]

---

[1]There are also probate proceedings pending in Louisiana and Delaware but to our knowledge, no claim has been advanced that Hughes was a domiciliary of either of those states.

[2]The litigation spawned by the death of Howard Hughes is sufficiently extensive and far-flung that a comprehensive newsletter, *The Hughes Estate* (Armadillo Press, La Porte, Texas), has been published for the use of those persons concerned with the estate. There are, as noted, three pending probates in which

Both California and Texas are contending that Hughes was a domiciliary of their respective jurisdictions and each is seeking to collect the resulting inheritance tax. The effect of the multiple taxation by both California and Texas would be the imposition of death taxes which substantially exceed the net assets of the estate. The effective rate of tax in California on all amounts in excess of $400,000 is 24% (see CALIF. REV. & TAX CODE §13406;[3] the effective rate of tax in Texas (including the so-called "pick-up tax") on amounts exceeding $1,000,000 is approximately 16% (see TEX. TAX-GEN. ANN. Art. 14.05;

---

the question of domicile will, unless this Court assumes jurisdiction, be adjudicated. In addition to the Nevada, California and Texas proceedings, ancillary probates are pending in at least two other states (see note 1, *supra*); if inconsistent adjudications of domicile occur, the ancillary jurisdictions will face difficult problems in the administration of the respective local estates.

There is also pending in the courts of Delaware an interpleader action instituted by Summa Corporation in which it seeks cancellation of decedent's shares of Summa and a judicial determination of their ownership. Complaint ¶8. Jurisdiction was asserted on the basis of 8 DEL. C. §169, which provides that the situs of shares in a Delaware corporation is Delaware regardless of the location of the share certificates.

A will, known popularly as the "Mormon will" or "Dummar will", has been offered for probate in the Nevada, Texas and California proceedings. (Complaint ¶¶5, 7). Its validity is the subject of considerable controversy, to say the least.

Additionally, the Howard Hughes Medical Institute has alleged that Hughes executed a "lost will" which devised his entire estate to it. This contention is apparently the subject of proceedings in Nevada alone, at least at present. (Complaint ¶7).

We stress that a determination of the Texas domicile claim is all that is sought in this Court; all other questions will properly be the subject of adjudication in the state courts having jurisdiction.

[3]Under California law, decedent's next-of-kin (and, *a fortiori,* the remaining heirs) are classified as "Class C Transferees", who are subject to the maximum rates. Lesser rates would have been applicable if Hughes had left a wife, lineal issue or nieces or nephews. See *id.* §§13307, 13308, 13309.

art. 14.12); and the federal estate tax on amounts in excess of $10,000,000 is 77%, less a credit of 16% for state death taxes (See 26 U.S.C. §§2001, 2011).

The estate has filed a federal estate tax return reflecting a valuation of $166,800,140. (Complaint ¶ 10). If the assets of the estate are valued as reported in the federal estate tax return, the taxes and interest due to Texas, California, and the United States will total $72,609,296, and will exceed the net assets of the estate by approximately $21 million. (Complaint, ¶ 13).[4]

Accordingly, if Texas were successful in establishing a Texas domicile in its state court proceedings and in collecting its inheritance taxes from the estate, after payment of federal taxes, interest, and other liabilities there would remain less than $11,351,580 (using the estate's valuations) against a California inheritance tax of more than $32 million (Complaint ¶ 13).

Texas and California are, therefore, on a collision course. Whichever state perfects and executes its

[4]The computation of the various taxes is described in Appendix "A" to the Complaint. The California tax is greater in proportion to the federal estate tax than the respective rates would imply because California law does not permit certain deductions from the gross estate which are allowable for purposes of determining the federal estate tax.

The actual values of the estate's assets may be significantly greater than as reported by the estate in its federal estate tax return. The Internal Revenue Service and California (and, presumably, Texas) are each in the process of determining administratively the value of the estate. If the assets of the estate are found to have a greater value than as reported, the amount by which the taxes exceed the net assets will be increased. Complaint ¶14.

judgment will irreparably injure the other by depriving it of the very assets needed to satisfy the tax.[5]

The risk of inconsistent adjudications in the California and Texas proceedings is anything but hypothetical. Like the decedent in *Texas v. Florida, supra,* Howard Hughes lived so "as to afford substantial basis" (306 U.S., at 411) for multiple claims of domicile. Born in Houston, Texas in 1905, he resided in Texas until 1926 when, at the age of 20, he moved to California. From the time he moved to California until the day he died, Hughes apparently returned to Texas only for occasional visits. Nonetheless, he continued to use Texas as a mailing address and occasionally claimed Texas as his domicile long after he ceased to have any physical presence there.

Hughes lived in California for 40 years, from 1926 to 1966. During this time, he developed substantial new business interests and investments, including film

[5]Although the estate has previously claimed that Nevada was the state of decedent's domicile, the disagreement between California and the estate as to whether Hughes died a domiciliary of Nevada or California would be capable of resolution by compromise except for the presence of the inheritance tax demand of Texas. Indeed, California and the interested heirs and administrators have agreed upon a provisional settlement whereby, if the Texas tax claim is resolved adversely to Texas by the Court, they will agree to pay an inheritance tax to California. The provisional settlement is, however, not binding upon any of the parties thereto if the Court declines to exercise its original jurisdiction herein. Complaint ¶16. While this provisional settlement will therefore be of little value if the Court fails to exercise its original jurisdiction to resolve the dispute between Texas and California, it does serve to narrow the issue which the Court is asked to adjudicate, for the controversy is thereby squarely focused upon the question of whether Texas was the state of domicile; if it was not, the remaining inheritance tax claim of California will be disposed of by the provisional settlement agreement.

production, aviation and aircraft manufacture, and numerous other ventures in California. Until his death, the center of his business operations remained in California, although he acquired substantial property elsewhere, both directly and through his wholly-owned corporation, known in later years as Summa Corporation.

In 1966, Hughes traveled to Boston, Massachusetts, where he spent five months. He then travelled to Las Vegas, Nevada, where he remained until 1970. Thereafter he moved his retinue from place to place, travelling successively to the Bahamas, Nicaragua, Vancouver, London, and the Bahamas again, eventually arriving in Acapulco, Mexico. So far as is known, Hughes formed no personal roots in Nevada or in any subsequent location, living in almost total seclusion in a hotel room from which he seldom, if ever, ventured. In early April, 1976 while in Acapulco, Mr. Hughes became critically ill and was rushed by plane for medical treatment to Houston, Texas. He died en route.

While even this bare outline of Mr. Hughes' life demonstrates that different jurisdictions could well reach conflicting determinations as to his domicile, there are several additional reasons why conflicting findings of domicile are entirely likely. First, Hughes made "numerous self-serving statements . . . as to his domicile, which, because made for the purpose of avoiding liability for state . . . taxes levied on the basis of domicile tended to conceal rather than reveal the true relationship" (*Texas v. Florida, supra,* at

411) of Hughes to the various jurisdictions in which domicile is claimed. Second, Hughes' business interests and investments were extraordinarily diverse, both in terms of geographical location and field of commercial endeavor, despite the fact that the "communications center," through which he controlled his vast empire, remained in California throughout his travels. Finally, the usual indicia of domicile, such as the establishment of a permanent place of residence, the presence or absence of personal effects and community involvement are absent in this case, due to the unusual, indeed bizarre, way in whieh Hughes lived. As far as is presently known, "home" for Hughes during the last ten years of his life was a series of barren hotel rooms which fulfilled only the most primitive function of a home: the provision of shelter against the rain.

This case is thus a paradigm—albeit an extreme one—of the problems inherent in the domicile concept. While the "hornbook law" of domicile can be simply stated—"domicile" equals "physical presence" plus "intent to remain"—the concept of domicile is easier to define than to apply. Not only does one legal concept have to fit an infinite variety of living situations, the determination of domicile usually hinges on the elusive finding that the decedent intended to make a place his home. And what at first blush may appear as most direct evidence of the requisite intention—a person's statements—will often, as here, be more the reflection of calculated advantage than of an actual intention to establish a permanent home. See *Texas v. Florida, supra,* at 411. The risk of incon-

sistent adjudications in this case is thus exacerbated by both the manner in which decedent lived and the ephemeral nature of the domicile concept.[6]

The Court's jurisdiction to resolve this controversy between California and Texas is established by *Texas v. Florida,* 306 U.S. 398 (1938). There, on facts remarkably like those presented here, the Court accepted jurisdiction over an original proceeding involving conflicting inheritance tax claims by four states, each of which had asserted that the decedent was a domiciliary. The Court acknowledged that inconsistent adjudications of domicile and the accompanying imposition of multiple inheritance taxes were constitutionally tolerable *(id.,* at 410; see pp. 12-13, *infra)* and that the judgments of each state assessing tax liability were binding upon the parties to the proceedings and entitled to full faith and credit. *Id.* But while no federal question is presented by multiple and inconsistent imposition of domicile-based inheritance taxes, the Court found appropriate the invocation of its original jurisdiction where the claims of the respective states (and the federal estate tax) exceeded the net assets of the estate:

[6]Professor Reese has succinctly described the difficulties inherent in the ascertainment of domicile:

> "The rules relating to the determination of domicile are extremely general and flexible in operation, revolving as they generally do around the intention to make a home. And, in close cases, differing inferences as to this intention can easily be drawn from the evidence presented . . . . The rules of domicile are extremely flexible in application, both because of their generality and because they depend so frequently in ultimate analysis upon the determination of a question of fact as to the individual's attitude of mind towards the place in question." Reese, *Does Domicile Bear a Single Meaning?* 55 COL. L. REV. 589 (1955).

> "The essential of the bill in the nature of interpleader is that it calls upon the court to exercise its jurisdiction to guard against the risks of loss from the prosecution in independent suits of rival claims where the plaintiff himself claims an interest in the property or fund which is subjected to the risk. The object and ground of the jurisdiction are to guard against the consequent depletion of the fund at the expense of the plaintiff's interest in it and to protect him and the other parties to the suit from the jeopardy resulting from the prosecution of numerous demands, to only one of which the fund is subject." *(Id.,* at 406-07).

In this case, the risk of inconsistent findings of domicile—the potential for an infliction of death taxes which would exceed the available assets of a legendary estate—is far more than the "fair probability" that the Court found to justify the assumption of jurisdiction in *Texas v. Florida, supra.*[7]

Several settled principles make inevitable the conclusion that, absent the exercise of this Court's original jurisdiction for a "single litigation binding on the

[7]The possibility of inconsistent adjudications is enhanced by the reality that domicile will be determined by local juries who cannot be unaware of the consequences of a finding by them of a local domicile. Each state which obtains a finding of domicile in its own courts will receive substantial tax revenues even if—for the reasons discussed herein—its full tax claim will not be satisfied. Indeed, the potential recovery could be large enough to diminish the tax burden faced by each citizen in Texas or California. *Cf. Tumey v. Ohio,* 273 U.S. 510 (1927); *Ward v. City of Monroeville,* 409 U.S. 57 (1973). It was, of course, precisely to eliminate the intrusion of parochial interests in controversies affecting two or more states that this Court was established as the exclusive forum to resolve interstate controversies.

parties" (*Texas v. Florida, supra,* at 412), there simply is no available means by which any of the interested parties can protect against the substantial possibility of the multiple imposition of inheritance taxes in excess of the available assets of the estate.

First, California is not a party to the Texas proceedings and will not be bound by any determination of domicile made therein. *Texas v. Florida, supra,* at 411; *Riley v. New York Trust Co.,* 315 U.S. 343 (1941). Texas may determine that Hughes was a domiciliary of Texas and impose its inheritance tax, but California will not be bound by that judgment.

Second, California is therefore free to determine, inconsistently with any Texas judgment, that Hughes died domiciled in California and tax the estate and heirs accordingly. *Nevin v. Martin,* 307 U.S. 615 (1939) (per curiam), *affirming* 22 F. Supp. 836 (D.N.J. 1938). In that event, neither the Texas judgment nor the California judgment will be reviewable in this Court because no federal question is presented. *Worcester County Trust Co. v. Riley,* 302 U.S. 292 (1937); *Texas v. Florida, supra,* at 410-11.[8] Indeed,

[8]The Court said in *Worcester County Trust Co. v. Riley, supra,* at 299-300:

> "Petitioner's real concern is that the judgment of the California court, if it should decide that decedent was domiciled there, may be erroneous or may conflict with that of the Massachusetts courts. But conflicting decisions upon the same issue of fact do not necessarily connote erroneous judicial action. Differences in proof and the latitude necessarily allowed to the trier of fact in each case to weigh and draw inferences from evidence and to pass upon the credibility of witnesses, might lead an appellate court to conclude that in none is the judgment erroneous. In any case the Constitution of the United States does not guarantee that the decisions of state courts shall be free from error [citations] or require that pronouncements shall be consistent. [citation]. Neither the Fourteenth Amendment nor the full faith and credit clause requires uniformity in the decisions of the courts of different states as to the place of domicil, where the exertion of state power is dependent upon domicil within its boundaries [citations]. Hence it cannot be said that the threatened action of respondents involves any breach of state law or of the laws or Constitution of the United States."

the Court has consistently refused to review inconsistent adjudications of domicile. *See, e.g.,* the denials of certiorari in *Estate of Dorrance,* 287 U.S. 660 (1932); 288 U.S. 617 (1933); and 298 U.S. 678 (1936).

Third, the estate and heirs are without remedy against multiple imposition of tax. They may not interplead the competing states (or even the tax collection officials thereof) in a federal district court because of the bar of the Eleventh Amendment. *Worcester County Trust Co. v. Riley, supra.* They may not enjoin in federal court the collection of the tax by either state (*Hill v. Martin,* 296 U.S. 393 (1935) (per curiam), *affirming* 12 F. Supp. 746 (1935)) because, *inter alia,* of the anti-injunction rule of 28 U.S.C. §2283; see also 28 U.S.C. §1341. As already noted, inconsistent adjudications by the state courts are not reviewable in this Court on certiorari. Finally, the arbitration processes established by the Uniform Act on Interstate Arbitration of Death Taxes (see CALIF. REV. & TAX CODE §§14197-14197.13) and the alternative statutory arbitration procedure in force in several states (see *id.* §§14199-14199.13) are unavailable because Texas has not adopted either of those Acts. See CCH INHERITANCE, ESTATE & GIFT TAX REPORTER ¶12,035.

Fourth, neither state has any remedy against the other except by original suit in this Court. As just noted, the arbitration mechanism is unavailable. Neither state can obtain jurisdiction over the other absent a voluntary appearance; beyond that, this Court's original jurisdiction over controversies between states is exclusive. 28 U.S.C. §1251(a)(1).

Accordingly, this Motion presents no occasion for consideration of whether the existence of alternative forums renders the invocation of the Court's original jurisdiction inappropriate. *Compare Massachusetts v. Missouri,* 308 U.S. 1, 19-20 (1939); *Ohio v. Wyandotte Chemicals Co.,* 401 U.S. 493 (1971); *Illinois v. City of Milwaukee,* 406 U.S. 91, 93 (1972); *Washington v. General Motors Corp.,* 406 U.S. 109 (1972).[9]

[9]If there were some alternative means by which the dispute between California and Texas might be resolved, the Court would then be presented with the question of whether the principle of the cases cited above—that original jurisdiction need not be exercised where an alternative forum exists—applies to suits between states founded on the Court's *exclusive* jurisdiction under 28 U.S.C. §1251(a)(1) as well as to suits between a state and a citizen of another state under the Court's *concurrent* jurisdiction established by 28 U.S.C. §1251(b)(2).

In *Arizona v. New Mexico,* 425 U.S. 794, 798-99 (1976), Mr. Justice Stevens filed a concurring opinion in which he suggested that the principle by which leave to file is denied where there is another forum may be inapplicable to suits under 28 U.S.C. §1251(a)(1) where the Court's jurisdiction is exclusive. *Accord:* HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 287 ¶(7) (2d ed. 1973). While the Court's opinion appears to take a different view, that case was unique in that the very question Arizona sought to litigate was pending in a lower court and, if that court were to sustain the tax, the issues raised could have been presented to the Court by an appeal as of right under 28 U.S.C. §1257(2); the result of denying leave to file an original complaint was, in effect, merely to divert the fact finding to the lower court subject to the ultimate resolution of the legal issue on appeal in this Court. See 425 U.S., at 797. The issue posed by Justice Stevens need not be faced in this case, for here there is no alternative forum and any decision of a Texas court finding Texas domicile could not be reviewed in this Court.

In this case, as in *Texas v. Florida,* "[t]he risk that decedent's estate might constitutionally be subjected to conflicting tax assessments in excess of its total value and that the right of [plaintiff] or some other state to collect the tax might thus be defeated [is] a real one. . . ." 306 U.S., at 410.

In an important respect this case is an even stronger one for the exercise of the Court's original jurisdiction than *Texas v. Florida, supra.* In that case the total net estate was exceeded by death taxes only on the hypothesis that, in addition to the federal estate tax, inheritance taxes would be levied by no less than *four* states; if only one of the four claimant states failed to establish domicile in its tax proceedings, the assets of the estate would have been sufficient to satisfy the tax claims of those remaining.[10] In short, jurisdiction was founded upon the "danger that out of the same events four state courts will spell four different domiciles. . . ." 306 U.S., at 431 (dissenting opinion). In the present case, the high rates of taxation which are applicable create a circumstance in which the courts of only *two* states—California and Texas—need disagree as to the decedent's domicile for the assets of the estate to prove insufficient to meet the resulting tax claims.

[10]The total net estate fell $1,589,877 short if all tax claims were sustained; the smallest of the four state tax claims was $4,663,857. 306 U.S., at 409 n. 2. There was, moreover, some reason to question whether at least one of the four states would seek to impose the tax. See Brief For the State of New York, at 2, quoted at 306 U.S., at 434 n. 10 (dissenting opinion).

CONCLUSION

For the reasons stated, the Motion should be granted, and the matter referred to a Special Master.[11]

DATED: November 11, 1977.

Respectfully,

MYRON SIEDORF
Chief Inheritance Tax Attorney
JAMES R. BIRNBERG
Assistant Inheritance Tax Attorney

JEROME B. FALK, JR.
STEVEN L. MAYER
HOWARD, PRIM, RICE, NEMEROVSKI,
CANADY & POLLAK
A Professional Corporation
Attorneys for Plaintiff

[11]No jury is required, this being an action in equity (*Texas v. Florida, supra*) as to which 28 U.S.C. §1872 does not apply. *United States v. Louisiana*, 339 U.S. 699, 706 (1950). The case is, of course, an appropriate one for the appointment of a special master, and the proposed complaint accordingly asks that the matter be referred.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. , Original

STATE OF CALIFORNIA,
Plaintiff,

vs.

STATE OF TEXAS,
Defendant.

COMPLAINT

Plaintiff, appearing through its duly authorized representative, Kenneth Cory, Controller of the State of California, alleges:

I. JURISDICTION

1. This is a controversy between two states within the Court's original and exclusive jurisdiction under Article III, Section 2 of the Constitution and 28 U.S.C. §1251(a)(1). The controversy exists because the State of California ("California") and the State of Texas ("Texas") each seek in the courts of their respective states to impose death taxes on the estate

of Howard Robard Hughes, Jr. ("decedent"), based upon assertions of California and Texas domicile. Should both states be successful in their respective courts, the resulting judgments (plus the federal estate tax due in any event, the expenses of administration, and other lawful liabilities of the estate) will exceed the estate's value. Since neither California nor Texas has appeared or will appear voluntarily in each other's courts and because this Court has exclusive jurisdiction over controversies between states, this Court offers the only available forum to achieve a resolution of the domicile issue which will be binding on all parties and ensure that the state to which the tax is properly due will be able to collect it.

II. PARTIES

2. Plaintiff California and defendant Texas are both states of the United States of America. Each state maintains, and has maintained at all relevant times herein, a system of inheritance taxation whereby statutory liens on the right of succession are imposed on real and tangible personal property located within its borders and the intangible personalty, wherever situated, of persons domiciled within each state. The responsible authorities in each state are claiming, in good faith, that decedent was domiciled therein at the time of his death and have taken steps to impose a tax on all the assets of the estate within their taxing jurisdiction, including intangibles (which constitute the overwhelming majority of the assets of the estate). In each state, the personal representative of decedent's estate is contesting the state's claim, asserting that decedent died domiciled in Nevada, the only state in the nation without death taxes. Both California and Texas compute their inheritance taxes on the basis of the fair market value of the estate's assets at the time of the decedent's death and both maintain a "pick-up tax" to ensure that the state receives the maximum amount allowable as a federal tax credit for state death taxes paid.

III. FACTUAL BACKGROUND

3. Howard Robard Hughes, Jr., was born in Texas in 1905. He resided in Texas until 1926, when he became a California domiciliary. He resided in California continuously until 1966 and acquired extensive business holdings and relationships there. Mr. Hughes filed non-resident income tax returns in California but paid tax at the resident rate (i.e., on all his income). His only known extended absence from California during this forty-year period was in 1953-54, when he temporarily resided in Nevada. After leaving California in 1966, Mr. Hughes travelled successively to Boston, Las Vegas, the Bahamas, Nicaragua, Canada, Florida, London, the Bahamas and Mexico, living in hotel rooms in the various locales but never acquiring another domicile. During this period, decedent retained his personal and business ties to California and the "nerve center" of his business operations remained there. Mr. Hughes died on

April 5, 1976, in an airplane en route to Houston, Texas.

IV. PENDING PROCEEDINGS

4. On April 14, 1976, nine days after the death of Mr. Hughes, probate proceedings were opened by representatives of the estate in the courts of Texas, Nevada and California. Annette Gano Lummis and William Lummis were appointed Co-Temporary Administrators of the Estate by Probate Court No. 2 of Harris County, Texas, while the nominees of Mrs. Lummis, First National Bank of Nevada and Richard C. Gano, were appointed Special Administrators of the estate by the probate courts of Nevada and California, respectively. Subsequently, William R. Lummis was added as a Co-Special Administrator in the Nevada proceeding.

5. On June 10, 1976, the State of Texas filed an appearance in the Texas probate proceedings, contending, *inter alia,* that Hughes was a Texas domiciliary at the time of his death and asserting its statutory inheritance tax lien against all assets within the Texas jurisdiction, including intangibles. The Texas Co-Temporary Administrators of the estate have resisted Texas' claims and asserted that Hughes acquired first a California and then a Nevada domicile. In addition, an alleged holographic will has been offered for probate; its validity has been challenged. A jury trial on the domicile and holographic will issues is presently set for November 14, 1977, with determination of the amount of tax to be left to a separate

proceeding in the event of a finding of Texas domicile. California is not a party to and therefore will not be bound by any judgment entered in the Texas proceedings.

6. California Inheritance Tax proceedings began with the appointment by the Superior Court, Los Angeles County, of an Inheritance Tax Referee to inventory and appraise the estate under California Probate Code §605 and California Revenue and Taxation Code §14501 *et seq.* On August 24, 1977, the California Special Administrator submitted the California Inheritance Tax Declaration to the Referee. The Special Administrator's Declaration asserted that decedent was a Nevada domiciliary and reported only tangible personal and real property located in California. The Inheritance Tax Referee has informed the Controller that he intends to file a report stating that there is now due an inheritance tax on the entire estate, less the real and tangible personal property located outside of California, on the basis that decedent was a California domiciliary. Notice of the filing of the report will be sent as required by law to all known persons potentially liable for tax. Objections to the Report based, *inter alia,* on the claim of Nevada domicile, will be filed. The question of decedent's domicile is therefore an issue in the California proceedings.

7. The State of Nevada imposes no inheritance tax. In the Nevada proceedings, the issues being litigated include the validity of a holographic will which has been offered for probate and the question of

domicile. In addition, a claim is pending by the Howard Hughes Medical Institute, a nonprofit corporation, that pursuant to an alleged lost will all the assets of the estate were devised to it. Texas, but not California, has appeared in the Nevada proceedings, claiming Hughes as its domiciliary and asserting its statutory lien. Trial on the validity of the holographic will is presently scheduled to commence on November 7, 1977, with trial of the domicile question to be heard subsequently. No trial is presently set on the lost will claim.

8. On May 4, 1976, Summa Corporation instituted an interpleader action in the Chancery Court of New Castle County, Delaware, seeking cancellation of its outstanding shares in decedent's name and direction from the court as to whom the shares should be reissued. Delaware jurisdiction was asserted on the basis of 8 DEL. C. §169, which provides that the situs of shares in a Delaware corporation is Delaware, regardless of where the physical certificates representing the shares are located. On the date the complaint was filed, the Delaware Chancery Court entered an order requiring Summa to recognize William Lummis, contemporaneously appointed as ancillary administrator of the estate in Delaware, as its sole shareholder *pendente lite*. The California Controller is not a party to the Delaware suit and will not be bound by any judgment entered therein.

9. At present, the issue of decedent's domicile is pending in the courts of California, Texas and Nevada, with the estate, through the personal representative in each state, asserting Nevada domicile in each jurisdiction. No state court, however, has reached a determination on the domicile issue. Neither Texas nor California is, or will become, a party to the proceedings in the other's courts, with the result that neither will be bound by an adverse determination in the other's forum. Under established principles of law, the courts of each state may render contradictory findings of domicile and those conflicting determinations would not be subject to review by this Court.

V. CONTROVERSY BETWEEN STATES

10. In its federal estate tax return, filed on June 29, 1977, the estate placed a value on its gross assets (as of October 5, 1976, six months after decedent's death, as permitted by 26 U.S.C. §2032) of $166,800,140. Deductions for expenses of administration, debts of decedent and liens on the estate's assets totaling $114,974,274 plus a $60,000 exemption were claimed, leaving a net estate of $51,765,866. Should the estate's valuation be accepted by the Internal Revenue Service, the federal estate tax levied on the net estate will be approximately $30,488,978, assuming decedent was domiciled in California or Texas, in which event the full federal tax credit for state inheritance taxes will be available as claimed by the estate. The estate will also be liable for interest on its tax obligation of at least $1,778,442 (which represents the interest from January 6, 1977, nine months after decedent's death to November 6, 1977), thus raising the total

tax obligation owing to the federal government to $32,267,400. For the Court's convenience the calculations leading to this figure are set forth in Appendix "A" hereto.

11. Should the Texas courts determine decedent to have been a Texas domiciliary, the estate's Texas liability (including accrued interest at the statutory rate through November 6, 1977 and the Texas "pick-up tax") will be $8,146,886, assuming that Texas accepts the estate's valuation of its assets and that the whole estate would go to Hughes' aunt or cousins. For the Court's convenience the calculations leading to this figure are set forth in Appendix "A" hereto.

12. Should the California courts accept the estate's valuation of its assets and determine that decedent was a California domiciliary, the estate's California tax liability (including interest at the statutory rate of 12% through November 6, 1977) will be $32,195,010. (The calculations leading to this figure are set forth in Appendix "A" hereto). The proportion of the estate going to California is significantly larger than the maximum rate of 24% would indicate, because the deductions allowable in California are some $67 million less than those recognizable under federal and Texas law, thus leaving a taxable estate for California tax purposes of $122,089,004 as opposed to the federal taxable estate of approximately $51 million.

13. If the estate's valuation of its assets set forth in the federal estate tax return were accepted by the federal government, California and Texas, the total tax liability for state and federal taxes would be

$72,609,296, thus exceeding the net estate by approximately $21 million. If the United States and Texas were to collect the taxes claimed by them, the estate would be left with only $11,351,580 with which to satisfy California's tax and interest claim of more than $32 million.

14. The actual values of the estate's assets may be significantly greater than as reported by the estate in its federal estate tax return. The Internal Revenue Service and California (and, presumably, Texas) are each in the process of determining administratively the value of the estate. If the assets of the estate are found to have a greater value than as reported, the amount by which the taxes exceed the net assets will be increased.

15. Because neither California nor Texas will become a party to the proceedings in the other state, and because there is no other means by which the conflicting tax claims of Texas and California can be resolved, this Court is the only forum which can determine the question of decedent's domicile in a manner which will bind the interested parties and assure that the state of domicile, if California or Texas, will be able to collect the tax. On information and belief, California further alleges that the estate has suffered and may continue to suffer substantial losses since the date of decedent's death which, especially in light of the interest which continues to accrue on unpaid death tax liabilities, exacerbates the risk that California will be able to collect the full amount of taxes and interest owed to it. Accordingly, California will

be irreparably injured if Texas is permitted to impose and collect an inheritance tax based on a determination by a Texas court of a Texas domicile.

16. The uncertainty as to the location of decedent's domicile impairs the ability of the interested parties to resolve the conflicting inheritance tax claims by settlement. Specifically, the interested intestate heirs, the various administrators of the California, Texas and Nevada estates, and the State of California have agreed upon a provisional settlement whereby California's inheritance tax claim—contested by the heirs and administrators on the ground that decedent was a Nevada domiciliary—could be compromised. However, because Texas asserts an inheritance tax as alleged herein, the compromise of California's inheritance tax claim pursuant to this provisional settlement agreement cannot be effected because the heirs and administrators are unwilling to bind themselves to pay an inheritance tax to California so long as the Texas tax claim is unresolved and threatens them with multiple tax liability. If this Court determines that Texas was not the state of decedent's domicile, the provisional settlement will be effected and the tax claim of California will accordingly be resolved and compromised pursuant to the provisional settlement agreement. The provisional settlement agreement will be of no force and effect if this Court declines to exercise its original jurisdiction herein.

17. This suit is being brought on behalf of the State of California to protect its statutory inheritance tax lien on decedent's estate and to collect any lawfully imposed tax thereon, and not on behalf of the estate or any other person or entity.

WHEREFORE, plaintiff prays that:

(a) The Court grant leave to file the instant complaint and issue its summons to the defendant named herein;

(b) The Court refer the matter to a Special Master;

(c) The Court declare that Texas was not the State of decedent's domicile on the date of his death; and

(d) The Court grant such other and further relief as may be just and proper.

DATED: November 11, 1977.

Respectfully,

MYRON SIEDORF
Chief Inheritance Tax Attorney
JAMES R. BIRNBERG
Assistant Inheritance Tax Attorney

JEROME B. FALK, JR.
STEVEN L. MAYER
HOWARD, PRIM, RICE, NEMEROVSKI,
CANADY & POLLAK
A Professional Corporation
Attorneys for Plaintiff

(Appendix "A" Follows)

Appendix "A"

Appendix "A"

COMPUTATION OF FEDERAL ESTATE TAX AND DEATH TAXES FOR CALIFORNIA AND TEXAS

(Assuming Values Per Federal Estate Tax Return)

	Federal	Texas[1]	California[2]	Total Federal and State Taxes
Total Gross Estate	$166,800,140	$166,800,140	$169,995,076	
Total Deductions, etc.	115,034,274	114,974,274	47,906,072	
Taxable Estate	$ 51,765,866	$ 51,825,866	$122,089,004	
Gross Estate Taxes	38,247,917	7,729,690	29,268,191	
Credit for State Death Taxes	7,758,939			
Net Taxes	30,488,978	7,729,690	29,268,191	
Add: Pick-up Tax		29,249	—	
Interest (1/6/77 to 11/6/77)	1,778,422	387,947	2,926,819	
Total Taxes and Interest	$ 32,267,400	$ 8,146,886	$ 26,128,129	$72,609,296

[1]The calculation of the Texas tax assumes use of the alternate valuation date and the allowance of all deductions claimed on the federal tax return. The applicable tax rate assumes that the entire estate will pass to persons who are either an aunt or a cousin of decedent. Interest is computed at 6%, commencing nine months after date of death.

[2]The value of the gross estate is larger than shown in the federal estate tax because California law does not allow use of the alternate valuation date. The deductions allowed also differ from those permitted under federal law. Interest under California law runs at 12%, commencing nine months after the date of death.

Supreme Court, U. S.
FILED
JAN 13 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. 76, ORIGINAL

* * *

STATE OF CALIFORNIA,

Plaintiff,

V.

STATE OF TEXAS,

Defendant

* * *

ON MOTION FOR LEAVE TO FILE COMPLAINT

* * *

BRIEF IN OPPOSITION

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

LEE C. CLYBURN
Admin. Asst. Attorney General

RICK HARRISON
Special Asst. Attorney General

DAVID DEADERICK
Assistant Attorney General

RICK ARNETT
Assistant Attorney General

Attorneys for Defendant

SUBJECT INDEX

Page

QUESTIONS PRESENTED 1

STATEMENT 2

SUMMARY OF ARGUMENT 7

ARGUMENT AND AUTHORITIES 8

I. The Agreements Between California and the Estate Preclude Invocation by California of This Court's Original Jurisdiction 8

II. California's Complaint Presents No Existent Case or Controversy Between California and Texas 11

A. This Case Is Clearly Distinct From *Texas v. Florida* 11

B. The Uncertainties and Contingencies Involved in California's Complaint Make This Suit Premature 17

III. *Texas v. Florida* Constitutes a Highly Questionable Exercise of This Court's Original Jurisdiction and Should Not Be Extended to This Case 19

IV. Abstention Doctrines Developed by This Court Subsequent to *Texas v. Florida* Impel the Denial of California's Motion for Leave to File Complaint 25

CONCLUSION 30

CERTIFICATE OF SERVICE 31

APPENDIX ..... Separately Bound

INDEX OF AUTHORITIES

Cases	Page
Arizona v. New Mexico, 425 U.S. 794 (1976)	29
Arndt v. Griggs, 134 U.S. 316 (1890)	23
Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936)	18,19
Baldwin v. Missouri, 281 U.S. 586 (1930)	24
Brown v. Fletcher's Estate, 210 U.S. 82 (1908)	23
Case of the State Freight Tax, 15 Wall. 232 (1872)	21
Chisolm v. Georgia, 2 Dall. 419 (1793)	29
Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1 (1961)	18
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977)	20,24
Eccles v. Peoples Bank of Lakewood Village, California, 333 U.S. 426 (1948)	17,18
Florida v. Anderson, 91 U.S. 667 (1875)	20
Frick v. Pennsylvania, 268 U.S. 473 (1925)	14,24,28
Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1945)	29
Georgia v. Stanton, 6 Wall. 50 (1867)	21
Holland v. Jackson, 37 S.W.2d 726 (Tex. 1931)	29
Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)	25,26
Illinois v. Michigan, 409 U.S. 36 (1972)	8
In re Estate of Bills, 542 S.W.2d 943 (Tex.Civ.App.-Texarkana 1976, writ ref'd. n.r.e.)	29

Cases Continued	Page
In re Rapoport's Estate, 26 N.W.2d 777 (Mich. 1947), cert. denied, California v. Michigan State Board of Escheats, 332 U.S. 764 (1947)	25
Iowa v. Slimmer, 248 U.S. 115 (1918)	23
Judice v. Vail, 430 U.S. 327 (1977)	25,28
Kansas v. Colorado, 206 U.S. 46 (1907)	19,20,23
Kansas v. United States, 204 U.S. 331 (1907)	8
Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861)	29
Lake Shore National Bank v. Coyle, 419 F.2d 958 (7th Cir. 1969)	15
License Cases, 5 How. 504 (1847)	22
Liverpool, New York & Philadelphia S.S. Co. v. Commissioners, 113 U.S. 33 (1885)	18
Longshoremen's Union v. Boyd, 347 U.S. 222 (1954)	18
Mager v. Grima, 8 How. 490 (1850)	24
Massachusetts v. Missouri, 308 U.S. 1 (1939)	16,17,29
Matthews v. Rogers, 284 U.S. 521 (1932)	22
McCulloch v. Maryland, 4 Wheat. 316 (1819)	21
Milwaukee County v. White Co., 296 U.S. 268 (1935)	22,30
Nelson v. Miller, 201 F.2d 277 (9th Cir. 1952)	25,26
New Hampshire v. Louisiana, 108 U.S. 76 (1883)	10
Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971)	19,26,27,28,29

Cases Continued **Page**

Oklahoma v. Cook, 304 U.S. 387 (1938) 8,10

Parker v. Los Angeles County, 338 U.S. 327 (1949) 17

Pennoyer v. Neff, 95 U.S. 714 (1877) 23

Pennsylvania v. West Virginia, 262 U.S. 553 (1923) 20

Poe v. Ullman, 367 U.S. 497 (1961) 19

Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806 (1945) 11

Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456 (1939) 28

Railroad Commission v. Pullman Co., 312 U.S. 496 (1941) 25

Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) 18

Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947) 19

Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1837) 19,22

Riley v. New York Trust Co., 315 U.S. 343 (1942) ... 16,17,22,23

Rosseau v. United States Trust Co. of New York, 422 F.Supp. 447 (S.D.N.Y. 1976) 28

Schlesinger v. Councilman, 420 U.S. 738 (1975) 26

South Dakota v. North Carolina, 192 U.S. 286 (1904) 10,20

State Tax Commission v. Aldrich, 316 U.S. 174 (1942) 24

Texas v. Florida, 306 U.S. 398 (1939) 7,8,11,12,15,16,17,18, 19,20,21,22,24,25,26

Cases Continued **Page**

Texas v. New Jersey, 379 U.S. 674 (1965) 20,21,23

Texas v. White, 7 Wall. 700 (1868) 20

Thompson v. Whitman, 18 Wall. 457 (1873) 30

Trainor v. Hernandez, 431 U.S. 434 (1977) 26

Treichler v. Wisconsin, 338 U.S. 251 (1949) 14,24,28

United States v. Bank of New York Co., 296 U.S. 463 (1936) 28

United States v. First National City Bank, 321 F.2d 14 (2nd Cir. 1963) 21

Virginia v. West Virginia, 238 U.S. 202 (1915) 20

Vogel v. New York Life Ins., 55 F.2d 205 (5th Cir. 1932), cert. denied, 287 U.S. 604 (1932) 25

Western Union v. Pennsylvania, 368 U.S. 71 (1961) 20,23

Williams v. Williams, 532 F.2d 120 (8th Cir. 1976) 26

Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888) 21

Worcester County Trust Co. v. Riley, 302 U.S. 292 (1937) 20,23

Younger v. Harris, 401 U.S. 37 (1971) 26

Constitution

U.S. CONST. art. III, §2 18,27

U.S. CONST. amend. XIV 22

Cases Continued **Page**

Statutes

26 U.S.C.:
Section 501(c) (3) 14
Section 2001 13
Section 2011 13
Section 2053 15
Section 2055 12,15
Section 6166A (Supp. 1977) 15

TEX.TAX-GEN.:
Article 14.01 29
Article 14.015(2) 12,15
Article 14.05 13
Article 14.10 15
Article 14.12 13
Article 14.16(a) (Supp. 1976) 15

TEX. PROB. CODE:
Section 2(e) 28
Section 410 29

CAL. REV. & TAX. CODE:
Section 13406 13
Section 13842 12,15
Section 13983 15
Section 13986 15
Section 13988 15
Section 17014 5

Other Authorities

THE FEDERALIST NO. 32 (A. Hamilton) (Bicentennial ed., 1976) 22,24

International Enforcement of Tax Claims, 50 Colum. L.R. 490 (1950) 21,22

O'CONNELL, D., INTERNATIONAL LAW (2nd ed. 1970) . 21

WHITEMAN, M., 8 DIGEST OF INTERNATIONAL LAW (1967) 21,22

Cases Continued **Page**

WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE (1975) 18

39 Colum. L.R. 1017 (1939) 22

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. 76, ORIGINAL

* * *

STATE OF CALIFORNIA,

Plaintiff,

V.

STATE OF TEXAS,

Defendant

* * *

ON MOTION FOR LEAVE TO FILE COMPLAINT

* * *

BRIEF IN OPPOSITION

* * * * *

QUESTIONS PRESENTED

1. Does this Court's original jurisdiction extend to suits brought by a state on behalf of private parties pursuant to a contract to obtain the Court's jurisdiction?

2. Do the actions and agreements of California and the estate bar relief in this case under the doctrine of unclean hands?

3. Does a state's claim based upon a contract with private parties provide an adequate basis for the exercise of this Court's original jurisdiction?

4. Is the possible damage of California of such a contingent and speculative nature as to render this case premature?

5. Should *Texas v. Florida* be extended to cases in which a state has not abdicated its soverign jurisdiction?

6. Should this Court defer to the ongoing state court proceedings and abstain from exercising jurisdiction in this case?

STATEMENT

Howard Robard Hughes, Jr., was born in Houston, Texas on December 24, 1905, to parents domiciled in Texas. His father was an inventor and manufacturer. His mother was a member of a prominent family that settled in Texas in 1856. Hughes' mother died in 1922, his father in 1924. A Houston court removed the disability of minority from the nineteen-year-old Hughes and allowed him to take control of Hughes Tool Company (hereinafter "Toolco"), which manufactured oil well equipment.

In June of 1925 Mr. Hughes married Ella Botts Rice, a member of the distinguished Houston family for whom Rice University is named. Mr. Hughes developed interests in film making and aviation and began making trips to Los Angeles, California to pursue those avocations. By 1929, when Ella obtained a divorce in Houston, Mr. Hughes had begun to spend a considerable amount of his time in southern California. For the next two decades he traveled extensively, spending much of his time making cross-country test flights. While Mr. Hughes based his aviation and movie activities in California, he spend much of his time elsewhere during this period.

In 1940 Mr. Hughes registered with a Houston draft

board and was given a deferment to continue his airplane and armament manufacturing in Texas and California during World War II. In sworn testimony in 1947 before a Senate committee investigating claims of profiteering on wartime contracts, he gave his residence as Houston, Texas and stated that his company was headquartered there. Mr. Hughes claimed that any profit he may have made came from selling drill bits and beer to Texans and expressed disdain at the attempt to impugn his integrity, stating, "I believe I have the reputation in that respect which most Texans consider important. That is to say, if I may use a corny phrase, I believe people consider my word to be my bond." Testifying in a state court civil trial in California in 1952, Mr. Hughes stated that although he was then staying at the Beverly Hills Hotel, his domicile was Houston, Texas.

From 1950 until 1966 Mr. Hughes spent most of his time in California, although he was also in Nevada, Florida, Canada and the Bahamas for significant periods of time. The majority of his time in California during this period was spent at the Beverly Hills Hotel, where he rented rooms on a day-to-day basis.

In 1966 Mr. Hughes traveled to Boston, Massachusetts and then to Las Vegas, Nevada. He stayed in the penthouse of the Desert Inn in Las Vegas until November of 1970, when he went to the Bahamas. On February 17, 1972, Mr. Hughes went to Managua, Nicaragua. He then traveled to Vancouver, British Columbia for five months, back to Nicaragua for four months, and to London for a year. On December 20, 1973, he left England and returned to the Bahamas. He remained there until February 11, 1976, when he and his traveling party moved to Acapulco, Mexico. On April 5, 1976, Mr. Hughes was placed on a private jet, bound for Methodist Hospital in Houston, Texas. He

died en route shortly after the plane passed over Brownsville, Texas. Mr. Hughes was buried next to his parents in Houston's Glenwood Cemetery. He had maintained this family burial plot since his father's death in 1924 but did not finally purchase a perpetuity deed thereon until 1973, soon after he had undergone major surgery in London for a hip injury that was to keep him bedridden for the remaining three years of his life.

The death of Mr. Hughes triggered an immediate search for a valid will which would dispose of his vast empire. On April 14, 1976, probate proceedings were begun in California, Texas and Nevada. Summa Corporation, comprised of the remainder of Toolco after the sale of the oil tool division in 1972 and owned solely by Mr. Hughes, filed suit in Delaware on May 4, 1976, seeking a determination of the ownership of its stock and naming as defendants the Controller of California and the Texas Comptroller of Public Accounts. A purported will of Mr. Hughes, dated March 19, 1968 (the "Mormon" will), containing substantial bequests to several charitable organizations (including the University of Texas and Rice University), surfaced in late April of 1976 and was offered for probate in California, Nevada and Texas. Subsequently, the Howard Hughes Medical Institute ("HHMI"), a nonprofit corporation, appeared and asserted that Mr. Hughes had executed and never revoked a valid will (the "lost" will) leaving his entire estate to HHMI.

The defense of the Delaware lawsuit prompted an investigation by the Texas Attorney General of the life and death of Mr. Hughes. Numerous facts were uncovered indicating that he never abandoned his original Texas domicile. For example, Mr. Hughes paid his poll tax in Texas until 1952 and never registered to vote in any other jurisdiction. Throughout his lifetime

he filed his federal income tax returns in Texas and listed Houston, Texas as his residence.

Mr. Hughes was required to pay California income tax at the resident rate, but nevertheless filed nonresident returns and noted thereon that he was a legal resident of Texas. He thus obtained no financial benefit from such declarations. After Mr. Hughes' move to Nevada in 1966, California administratively determined that he was not a resident for tax purposes[1] and never again required him to pay the California personal income tax. (A-1).

Notwithstanding his extensive international travels during the last decade of his life, Mr. Hughes had no valid passport during this period. His last passport was issued in 1938 and it, as well as all of his previous passports, listed him as a resident of Houston, Texas. The only paper evidences of his many border crossings, an entry card into Vancouver signed by Mr. Hughes in 1972 and a United States Customs declaration signed by him in Florida in 1972, list Houston, Texas as his permanent residential address. In late December of 1975, only three months before his death, Mr. Hughes began negotiating the purchase of a $1.5 million penthouse complex atop a high-rise condominium in Houston.

Mr. Hughes maintained banking ties in Houston throughout his lifetime, always keeping personal checking accounts in Texas Commerce Bank. Loan transactions of Mr. Hughes and Toolco with Houston banks totaled tens of millions of dollars. The oil tool manufacturing plant in Houston was the principal

---

[1]California requires payment of its personal income tax at the resident rate from every individual who is either (1) present in California "for other than a temporary or transitory purpose" or (2) domiciled in California but "outside the State for a temporary or transitory purpose." CAL. REV. & TAX. CODE §17014.

source of revenue for Mr. Hughes throughout his lifetime. Approximately $745 million of before-tax profits were generated by Toolco during the time Mr. Hughes owned it. He received approximately $150 million when he sold the Houston operation to the public in 1972 to raise funds to satisfy the T.W.A. judgment, which was later reversed by this Court. It was the steady flow of funds from Houston that enabled this modern day Odysseus to pursue his business interests and travels elsewhere.

Upon learning many of these facts about Mr. Hughes, the Texas Attorney General entered an appearance for the State of Texas in the Houston probate proceeding on June 10, 1976, asking the Court to determine the validity of any purported will of Mr. Hughes and to declare Texas his domicile at the time of death. After extensive discovery a trial of the issues of domicile and the validity of the Mormon will was set for September 12, 1977. The temporary co-administrators[2] of the Hughes estate sought and received a continuance of that trial, which was reset for November 14, 1977. On November 8, 1977, the estate filed its second motion for continuance, which was denied.

On Friday, November 11, 1977, California Controller Kenneth Cory held a press conference, announcing that he had reached an agreement with the heirs and representatives of the Hughes estate and that he was filing this lawsuit. (B-1). On Monday, November 14, 1977, the temporary co-administrators filed their third motion for continuance in the Texas proceeding, this time based upon California's suit in this Court. On that same day, California filed its Application for Temporary Restraining Order and for Preliminary

---

[2]Annette Gano Lummis, Mr. Hughes' aunt and an heir under the intestacy laws of Texas, and her son William Rice Lummis are the temporary co-administrators in Texas.

Injunction with this Court, the submission of which was contingent upon the Texas court's denial of the estate's motion for continuance. (C-1). The honorable Pat Gregory, judge of Harris County Probate Court No. 2, denied the motion for continuance, and the trial commenced.

During the Christmas recess of the trial, the estate asked the Texas court to approve its agreement with California. William Rice Lummis, who until Mr. Hughes' death was a partner in the law firm that now represents him as heir and administrator, testified on December 19, 1977, that an additional agreement exists between California and the estate. (A transcript of the relevant portions of Mr. Lummis' testimony is attached as Appendix "D"; a copy of the primary agreement is attached as Appendix "E"; a copy of the letter agreement is attached as Appendix "F").

SUMMARY OF ARGUMENT

The actions and agreements of California and the Hughes estate reflect that this suit was brought on behalf of the estate and thus is not within this Court's original jurisdiction. The estate entered into these agreements in order to have this suit filed, while California did so for the opportunity of receiving tax money from the estate without having to rely on the validity of its own tax claim. For these reasons, the doctrine of unclean hands bars this collusive attempt to buy and sell this Court's equitable jurisdiction.

This Court's decision in *Texas v. Florida* does not require, and should not be extended to permit, exercise of original jurisdiction in this case. The existence of several contingent events, none of which were present in Colonel Green's estate proceedings, but all of which must occur here before California might possibly be

harmed, render this suit premature. California simply cannot show that it will be harmed by the actions of Texas and therefore lacks standing to bring this suit. Furthermore, this Court's exercise of jurisdiction in *Texas v. Florida* was unprecedented and constituted a singular intrusion into the traditional rights of states to distribute the local property of a decedent's estate and to administer their own tax laws.

Ongoing state court proceedings provide adequate alternative forums for the resolution of any dispute which might arise between California and Texas. The resources of this Court therefore need not be committed to an adjudication of questions of fact and issues of state law which may be without conclusive effect.

ARGUMENT

I. THE AGREEMENTS BETWEEN CALIFORNIA AND THE ESTATE PRECLUDE INVOCATION BY CALIFORNIA OF THIS COURT'S ORIGINAL JURISDICTION

It is well settled that this Court's original jurisdiction over controversies between states does not extend to suits brought in the name of a state but for the benefit of individuals. *Oklahoma v. Cook*, 304 U.S. 387 (1938); *Kansas v. United States*, 204 U.S. 331 (1907); *see also Illinois v. Michigan*, 409 U.S. 36 (1972). The events immediately preceding the commencement of the Texas trial clearly show that California and the representatives and heirs of the Hughes estate are working in tandem to invoke this Court's jurisdiction. California's Motion for Leave to File Complaint was filed pursuant[3] to the agreement between the Hughes

[3]In sworn testimony during a hearing in Texas on December 19, 1977, Lummis stated, "The application with the Supreme Court has been filed pursuant to this agreement. You can't ignore this agreement." *See* Appendix "D". (D-23)

estate and California, which provides that California is to receive two per cent (2%) of the federal net taxable estate if this Court accepts jurisdiction and determines that Mr. Hughes was a domiciliary of Texas. California is to receive eighteen per cent (18%) of the federal net taxable estate if this Court decides that Mr. Hughes was domiciled *anywhere* other than Texas. Thus, the estate is effectively contracting to pay two per cent (2%) of the federal net taxable estate to gain that which it could not obtain on its own, jurisdiction in this Court to litigate a part of the issue of the decedent's domicile.

The letter agreement between California and the estate, which was discovered by Texas only after this Court's denial of California's application for injunctive relief, requires the estate to furnish to California copies of pleadings, depositions, documentary evidence relevant to the issue of domicile, indices of documents, and factual analyses prepared by the estate's attorneys supporting the claim that Mr. Hughes acquired a California domicile upon leaving Texas. If this Court accepts jurisdiction of California's complaint, the agreement obligates the estate to share with California all factual and legal analyses regarding the claim that Mr. Hughes was a Nevada domiciliary. In addition, the estate would be bound to make its attorneys available to California for consultation to aid California in its litigation against Texas. The letter agreement further provides that if California does not resist the motion of the Nevada co-special administrators to become a party to this proceeding, the administrators would align themselves with California and take no position inconsistent with that of California. And, finally, the agreement provides that if the estate cannot obtain the necessary probate court approval of the primary agreement to pay California the required two per cent (2%) in excess of the maximum allowable federal credit,

the heirs themselves will pay the remainder as sufficient funds are distributed to them from the estate.

California asked this Court to halt the Texas trial, which the estate had repeatedly attempted to postpone, even though that trial presented no danger of irreparable harm to California's legitimate interests. The estate has contracted to pay California two per cent (2%) of the federal net taxable estate, regardless of the merits of California's claim, in return for its obtaining a domicile determination by this Court. And since California will receive eighteen per cent (18%) of the federal net taxable estate if Texas is determined not to have been Mr. Hughes' domicile at death, California comes to this Court asserting claims *other than its own.* Indeed, the agreements referred to above clearly show that California's lawsuit in this Court could well be only a means by which the estate will attempt to prove that Mr. Hughes was a Nevada domiciliary. *Compare New Hampshire v. Louisiana*, 108 U.S. 76 (1883) *with South Dakota v. North Carolina*, 192 U.S. 286 (1904) (a state must proceed on the basis of its own claim). These actions and agreements of California and the Hughes estate indicate that this suit is one brought on behalf of the estate and thus is not within this Court's original jurisdiction. *Oklahoma v. Cook, supra.*

California did not provide this Court with a copy of its primary agreement with the estate until after Texas, which knew of the contents of that agreement, was granted an opportunity to respond to California's motion for injunctive relief. Texas did not learn of the existence of the letter agreement between California and the estate, which is dated November 10, 1977, until Mr. Lummis testified on December 19, 1977. For reasons best known to itself, California has not seen fit to disclose that agreement to this Court. Such secrecy is not surprising in light of the contents of those

agreements. California has attempted to exchange its key to the door of this Court for the opportunity of receiving eighteen per cent (18%) of the federal net taxable estate of Howard Hughes *without regard to the validity of its claim.* The original jurisdiction of this Court should not be allowed to be the subject of barter with individual litigants.

For this Court to exercise its original jurisdiction under these circumstances would merely condone such behavior and encourage states with weak domicile claims and high inheritance tax rates to enter into similar agreements with wealthy estates. Under the doctrine of unclean hands, this Court should not reward this collusive attempt to invoke and use its original jurisdiction by granting California's motion for leave to file its complaint, for a court of equity is the judicial vehicle for effecting the mandates of conscience and good faith. *Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806 (1945).

II. CALIFORNIA'S COMPLAINT PRESENTS NO EXISTENT CASE OR CONTROVERSY BETWEEN CALIFORNIA AND TEXAS

A. *This Case Is Clearly Distinct From Texas v. Florida*

California's attempt to invoke this Court's original jurisdiction is based almost exclusively upon *Texas v. Florida*, 306 U.S. 398 (1939). The present posture of the Hughes estate proceedings, however, is quite different from the situation which prompted this Court to determine the domicile of Colonel Green. Probate proceedings in California, Nevada and Texas are focusing on the validity of the Mormon will, and the issues of the existence *vel non* and validity of the HHMI lost will are still pending. Under either of these alleged

wills, large percentages of the estate are to go to charitable organizations, and those bequests are exempt from federal, California and Texas death taxation. 26 U.S.C. §2055, CAL. REV. & TAX. CODE §13842; TEX. TAX.-GEN. art. 14.015(2). Tax claims would therefore be based on net taxable estates which would exclude the amounts of the charitable bequests, yet the amount of assets available to satisfy those tax claims would not be correspondingly reduced. Thus, if either the Mormon will or the HHMI lost will were admitted to probate, the combined tax claims of the federal government, California and Texas would be far less than 100% of the assets of the estate. In *Texas v. Florida* there existed no such contingency which would not have been resolved by this Court's determination of the domicile issue but which could have obviated any possible need for this Court to decide that issue.

In *Texas v. Florida* the assets of Colonel Green's estate were comprised largely of stocks, bonds and other intangible property, "[p]ractically all of [which] had a readily ascertainable market value as of the date of decedent's death." Bill of Complaint at 13, No. 11, Original (1937). Federal and state death taxes could therefore be accurately calculated on the basis of a relatively precise valuation of the estate assets. Thus, it was clear to the states involved, and could be specifically demonstrated to this Court by the plaintiff therein (State of Texas), that Colonel Green's estate would be insufficient to meet all of the potential tax claims against it, and the defendant states so admitted. 306 U.S. at 404.

The majority of the assets in Mr. Hughes' estate, however, consists of the stock of Summa Corporation, a highly-diversified conglomerate which was always solely owned by him. Among the far-flung holdings of Summa are hotels and casinos in Nevada and the

Bahamas; a 1317-acre parcel of undeveloped land in the Playa del Rey area of Los Angeles County, California; and Hughes Airwest, a regional airline. The diverse activities of Summa include helicopter manufacturing, television broadcasting, ranching, land and ocean mining, and aircraft servicing. The value of such a heterogenous mixture of corporate assets is not readily determinable and has been the subject of much speculation and dispute.[4] Under these circumstances, the possibility that the three potential taxing authorities could reach significantly different valuations of the estate assets is quite real. The sum of the percentages of the maximum possible tax being slightly less than 101%[5], deviations in the amount upon which those percentages are to be applied could easily drop the total tax to less than 100% of the estate, as valued by two of the three taxing authorities (including both Texas and

---

[4]The investment firm of Merrill Lynch, Pierce, Fenner & Smith ("Merrill Lynch") has billed the estate in excess of $400,000 for its efforts in rendering an opinion as to the fair market value of the estate assets. Merrill Lynch valued the entire estate at $166,800,140 for purposes of the federal estate tax return. California admits, however, that "[t]he actual values of the estate's assets may be significantly greater than as reported by the estate in its federal estate tax return. The Internal Revenue Service and California (and, presumably, Texas) are each in the Process of determining administratively the value of the estate...." Complaint at 25. Some estimates of Mr. Hughes' wealth at the time of his death range as high as two billion dollars.

[5]California's rate of tax on amounts in excess of $400,000 is 24%. CAL. REV. & TAX. CODE §13406. Texas' tax on amounts exceeding $1,000,000 is slightly less than 16%. TEX. TAX.-GEN. arts. 14.05, 14.12. The federal estate tax on amounts in excess of $10,000,000 is 77%, less a 16% credit for state death taxes. 26 U.S.C. §§2001, 2011.

California).[6]

At the present time no administrative determination of the value of the Hughes estate has been made by any of the potential taxing authorities. No administrative rulings have been made on the allowance of possible deductions which would not consume estate assets.[7]

---

[6]*E.g.*,

	Hypothetical Valuations of Estate	Rate of Tax	Hypothetical Taxes
California	500,000,000.	24%	$120,000,000.
Texas	450,000,000.	16%	$72,000,000.
Internal Rev. Ser.	400,000,000.	61%	$244,000,000
			$436,000,000.

California's alleged fear of being unable to collect a substantial amount of its tax is chimerical. It is interesting to note that even if that fear were legitimate, and each taxing authority's valuation and rulings on deductions were the same, California would still be able to collect over 23% of the net taxable estate out of its maximum tax claim of 24%. California asserts that a possible dispute as to this 1% of the net taxable estate creates an interstate controversy of sufficient moment to warrant the invocation of this Court's original jurisdiction. This claim of grave injury to be incurred by the possible loss of 1% of the net taxable estate appears rather disingenuous in light of California's agreement with the estate to relinquish 6% from their tax rate (from 24% down to 18%) if this Court ultimately determines that Mr. Hughes was not a Texas domiciliary at the time of his death.

[7]*E.g.*, In July of 1976, heirs of Mr. Hughes signed a settlement agreement which purports to determine the distribution of the estate assets in the event Hughes is found to have died intestate. Under this agreement Annette Gano Lummis, an aunt of the decedent, is given absolute discretion to distribute as much as 25% of the residuary estate to any charitable organization described by section 501(c) (3) of the Internal Revenue Code of 1954.

Also, to the extent that the assets of the estate are real or tangible personal property, only the situs state can constitutionally tax their transfer. *Treichler v. Wisconsin*, 338 U.S. 251 (1949); *Frick v. Pennsylvania*, 268 U.S. 473 (1925).

Under these circumstances, it is impossible for California to show that it will be unable to collect all of its tax even if California and Texas both tax the estate.[8]

The very fact that here the estate is the sole owner of a large corporation distinguishes this case from *Texas v. Florida*. This estate is not a static entity, which can pay out only an amount equal to its value at the time of Mr. Hughes' death. Summa Corporation is an income-generating entity. The federal government and Texas (and, presumably, California) allow estate taxes to be paid over a ten year period when a closely-held corporation constitutes a major portion of the estate. 26 U.S.C. §6166A (Supp. 1977); TEX. TAX.-GEN. art. 14.16(A) (Supp. 1976). The purpose of this long term pay-out provision is to allow the corporation to pay the tax from its profits and thus save the corporation from forced liquidation. *See Lake Shore National Bank v. Coyle*, 419 F.2d 958, 962 (7th Cir. 1969). Thus, even if a 101% tax rate is imposed upon the estate, Summa could well generate ample funds to pay the resulting tax.

---

[8]This Court should attach no credence to the unverified, hypothetical figures attached as Appendix "A" to California's Complaint. The erroneous legal assumptions used by California to derive the greatly differing taxable estates under federal, Texas and California law are no less striking than the obvious mistake in arithmetic. A mere glance at the three sets of statutes providing for allowable deductions reveals the absurdity, if not the intentional misrepresentation, of the vast differences in deductions in California's Appendix "A". *Compare* 26 U.S.C. §§2053, 2055 *and* TEX. TAX.-GEN. arts. 14.015(2), 14.10 *with* CAL. REV. & TAX. CODE §§13842, 13983, 13986, 13988.

Indeed, if California's figures were accurate, the taxes to be imposed by the federal government and California alone would exceed the estate assets by almost $13,000,000, and be approximately 125% of the federal net taxable estate. Surely all true Californians with a net worth in excess of $10 million do not have their estates similarly taxed.

Furthermore, in *Texas v. Florida* it was alleged and shown that the amount of estate assets situated within the borders of the complainant state (Texas) was negligible and insufficient to pay its tax. *Id.* at 403. Such a showing was essential to this Court's exercise of jurisdiction. Since each state has exclusive jurisdiction over the property within its borders, the existence of assets within a state sufficient to satisfy that state's tax claim would bar that state from claiming harm to it by virtue of another state's tax. California has neither alleged nor shown[9] that its local assets are insufficient to satisfy its tax claims and therefore lacks standing to argue that it is being injured at the hands of Texas. *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939) (complaining State must have suffered a wrong through the action of the other State).

A final judgment by the courts of Texas that Mr. Hughes was a Texan at the time of his death would have a direct effect only on estate assets located in Texas. Any attempt by Texas to levy on estate assets outside its borders would necessarily involve action by the situs state. *Riley v. New York Trust Co.*, 315 U.S. 343 (1942). At that time California could present its own judgment for full faith and credit and have the merits of the two judgments reviewed by the courts of the neutral state. Thus, if indeed there should be insufficient assets to satisfy California's tax, that situation would not be the result of wrongful action by Texas but rather would

[9]Such a showing would be difficult, as the estate owns 1317 acres of land in Playa del Rey, which constitutes the only large contiguous tract of undeveloped land in Los Angeles County. Although state land use restrictions could conceivably lower its value to a private purchaser, it would be virtually priceless to California.

result from the weakness of California's own claim.[10] *Massachusetts v. Missouri, supra.*

B. *The Uncertainties and Contingencies Involved in California's Complaint Make This Suit Premature*

Many contingent events must occur before California would be unable to collect all of its death taxes. The courts of both California and Texas would have to reach a final determination that Mr. Hughes died domiciled in their own state. Delaware would then have to refuse to credit California's judgment in its entirety. *Riley v. New York Trust Co., supra; see Parker v. Los Angeles County*, 338 U.S. 327, 332 (1949). The Mormon will and the HHMI lost will would have to be defeated. And as previously noted, differences in valuations and rulings on deductions and extended pay-out periods could even then result in sufficient assets to satisfy all tax claims.

> The concurrence of these contingent events, necessary for injury to be realized, is too speculative to warrant anticipatory judicial determinations. Courts should avoid passing on questions of public law even short of constitutionality that are not immediately pressing.

[10]The weakness of California's claim is directly related to its agreement with the estate and the limited relief sought from this Court. That California is not proceeding upon the strength of its own claim is illustrated by its unprecedented request for an advisory opinion that Texas was not the domicile of Mr. Hughes at time of death. Of course the states in *Texas v. Florida* asserted only their own statutory rights, and none sought to utilize the equitable jurisdiction of this court to collect funds without regard to the justness of its claim. By virtue of the agreement, the contrary situation would persist here even if California amends its Complaint.

Eccles v. Peoples Bank of Lakewood Village, California, 333 U.S. 426, 432 (1948). California's claim of harm is simply premature, and this Court should conserve its "judicial energies for litigants who have some real need of official dispute resolution." Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §3532 at 238. Especially where jurisdiction may ultimately hinge on particular theories of valuation, "[r]ulings on these questions would plainly be rulings upon 'hypothetical situations that may or may not [arise].' *Longshoremen's Union v. Boyd*, 347 U.S. 222, 224 (1954)." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 146 (1974).

Moreover, since this Court's original jurisdiction is governed by Article III, Section 2 of the Constitution, a decision to grant California leave to file its complaint is itself the resolution of a constitutional issue. If any of these contingencies fail to occur, the necessity of deciding that issue will vanish.

> No rule of practice of this Court is better settled than "never to anticipate a question of constitutional law in advance of the necessity of deciding it." *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners*, 113 U.S. 33, 39; Mr. Justice Brandeis, concurring, in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341.

Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1, 71-72 (1961).

California contends that the existence of these contingencies is unimportant since some uncertainties were also present in *Texas v. Florida*. In addition to glossing over the striking substantive differences in the contingencies involved here, this argument ignores the

fact that in more recent years[11] this Court has become much more aware of its finite judicial resources and much more alert to appropriate opportunities to avoid unnecessary expenditures of those resources. *See Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971); *Poe v. Ullman*, 367 U.S. 497, 502-09 (1961); *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 568-75 (1947).

III. TEXAS V. FLORIDA CONSTITUTES A HIGHLY QUESTIONABLE EXERCISE OF THIS COURT'S ORIGINAL JURISDICTION AND SHOULD NOT BE EXTENDED TO THIS CASE.

As demonstrated above (Section II), this Court's decision in *Texas v. Florida* is distinguishable on several grounds from California's complaint. Texas would go further, however, and show that *Texas v. Florida* stands alone in the constitutional law of this nation. Neither before nor since has this Court accepted jurisdiction over a purported cause of action so clearly a matter of state rather than federal jurisdiction. It should not provide the basis of this Court's doing so in this case.

Texas v. Florida was not an action in which the Court decided a matter of territorial jurisdiction such as a boundary question, *e.g.*, *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1837), nor in which "the action of one State reaches through the agency of natural laws into the territory of another State." *Kansas v. Colorado*,

---

[11]Indeed, only three years before the decision in *Texas v. Florida*, Mr. Justice Brandeis could not muster the support of a majority of the Court for his concurring opinion in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 341 (1936). That landmark opinion is now considered to be the bellwether of the policy against premature constitutional decision.

206 U.S. 46, 97 (1907) (water rights). It did not involve a constitutional question, *e.g., Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), or the enforcement of an interstate agreement or compact, *e.g., Virginia v. West Virginia*, 238 U.S. 202 (1915). It did not concern property owned by the complaining party. *South Dakota v. North Carolina, supra; Florida v. Anderson*, 91 U.S. 667 (1875); *Texas v. White*, 7 Wall. 700 (1868).

Furthermore, *Texas v. Florida* was dissimilar to the tandem cases of *Western Union v. Pennsylvania*, 368 U.S. 71 (1961), and *Texas v. New Jersey*, 379 U.S. 674 (1965), which are heavily relied upon by California. These cases concerned property which consisted of debts owed individuals which were commingled with general corporate funds. Each claimant state could assert that local funds of the corporation were in fact the property subject to escheat and "claim *in rem* jurisdiction over it." *Western Union v. Pennsylvania, supra* at 75. Collection of unconstitutional multiple escheats could thereby be effected. In order to protect the constitutional rights of the corporation, in *Texas v. New Jersey* the Court resolved the legal question of the location of the property for escheat purposes. Hence, acceptance of jurisdiction in *Texas v. New Jersey* did not conflict with the exclusive jurisdiction of any state over property within its borders. As in a boundary dispute, the question was which state had such jurisdiction. In *Texas v. Florida*, however, there was no question concerning the location of the various assets of Colonel Green's estate and thus no dispute as to which state could exercise *in rem* jurisdiction in the distribution thereof. There was no way by which tax collections could exceed the amount of the fund upon which the taxes were imposed and no prospective violation of constitutional rights. *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937); *cf. Complete Auto Transit,*

Inc. v. Brady, 430 U.S. 274 (1977) (states may tax upon the basis of benefits conferred).

A further comparison of *Texas v. Florida* and *Texas v. New Jersey* illustrates the inconsistency of the former with other adjudications of controversies between states. Escheat constitutes an exercise of property rights, *Georgia v. Stanton*, 6 Wall. 50, 73 (1867), whereas taxation is an exercise of the rights of sovereignty. *Case of the State Freight Tax*, 15 Wall. 232, 272 (1872); *McCulloch v. Maryland*, 4 Wheat. 316, 429 (1819). This Court has refused to exercise its jurisdiction for the protection of "rights of sovereignty." *Georgia v. Stanton, supra* at 77.

Similarly,

> [t]his court has declined to take jurisdiction of suits between States to compel the performance of obligations which, if the States had been independent nations, could not have been enforced judicially, but only through the political departments of their governments.

Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 287-88 (1888). The nature of the sovereign right of taxation is such that one nation may impose inheritance taxes without regard to the tax laws of another. 2 D. O'CONNELL, INTERNATIONAL LAW 617 (2nd ed. 1970); 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 523 (1967); *see United States v. First National City Bank*, 321 F.2d 14 (2nd Cir. 1963). Only recently have the political departments of various governments negotiated treaties in the matter. *United States v. First National City Bank, supra* at 24. Under existing treaties, determinations of citizenship and domicile are left to the courts of each nation. *International Enforcement of Tax Claims*, 50 Colum.

L.R. 490 (1950); *e.g.*, 8 M. WHITEMAN, *supra* at 524 (treaty between United States and Italy).

The framers of the Constitution did not intend for the original jurisdiction of this Court to supplant state court determinations of domicile in tax disputes. *Cf. Riley v. New York Trust Co., supra.*

> [I]ndividual States should possess an independent and uncontrollable authority to raise their own revenues . . . an attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of its Constitution.

THE FEDERALIST NO. 32 (A. Hamilton), Bicentennial Ed. at 193-94. *See also Matthews v. Rogers*, 284 U.S. 521, 525 (1932). Of course the Fourteenth Amendment restricted the states' authority on the basis of the constitutional rights of individuals, but nothing in the Constitution guarantees California that it will not suffer a loss of revenue from the proper administration of the laws of another state. *See Milwaukee County v. White Co.*, 296 U.S. 268 (1935).

In *Texas v. Florida*, the Court adjudicated claims based upon state law "previously considered to be exclusively in the jurisdiction of the state courts." 39 Colum. L.R. 1017, 1018 (1939); *Texas v. Florida, supra* at 432, n. 4 (opinion of Frankfurter, J.). The language of many cases decided by this Court demonstrates that *Texas v. Florida* represented a singular intrusion upon the exclusive jurisdiction of the various states to administer a decedent's local property and to prosecute tax claims under state law. A state has "full and absolute dominion" over property within its borders. *Rhode Island v. Massachusetts, supra* at 734.

> A State regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon all internal matters which relate to its moral and political welfare. Over these subjects the federal government has no power. They appertain to the state sovereignty as exclusively as powers exclusively delegated appertain to the general government.

License Cases, 5 How. 504, 588 (1847). *See also Riley v. New York Trust Co., supra* at 349; *Iowa v. Slimmer*, 248 U.S. 115 (1918); *Brown v. Fletcher's Estate*, 210 U.S. 82 (1908); *Arndt v. Griggs*, 134 U.S. 316, 320-21 (1890); *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877).

Occasional conflicts between sovereign rights of states are an inevitable result of our system of government.

> One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield to its own views to none.

Kansas v. Colorado, supra at 97. Such conflicts do not require this Court to exercise its original jurisdiction absent an adverse effect upon property owned by or within the jurisdiction of an offended state.[12] Certainly

---

[12]There are rare instances like *Texas v. New Jersey* where such a dispute causes a violation of an individual's constitutional rights, but it is difficult to imagine such an instance which would not involve a dispute as to the situs of property. No such constitutional rights are involved here. *Compare Western Union v. Pennsylvania, supra, with Worcester County Trust Co. v. Riley, supra.*

the proper distribution and taxation of a decedent's local property may be adjudicated by the various states without interference by the federal government.

> Now the law in question is nothing more than an exercise of the power which every State and sovereignty possesses, of regulating the manner and term upon which property real or personal within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it.

Mager v. Grima, 8 How. 490, 493 (1850). *See also Treichler v. Wisconsin*, *supra* at 256; *State Tax Commission v. Aldrich*, 316 U.S. 174 (1942); *Frick v. Pennsylvania*, *supra;* THE FEDERALIST NO. 32, *supra.*

An essential jurisdictional basis of *Texas v. Florida* was that only one state could properly tax the estate. This assumption is highly questionable in light of individual mobility in our society and the benefits a person such as Mr. Hughes had secured from the states in which he had lived and done business. *Texas v. Florida*, *supra* at 429 (opinion of Frankfurter, J.); *Baldwin v. Missouri*, 281 U.S. 586, 597 (1930) (opinion of Stone, J.). For example, under this Court's more enlightened approach to state taxation, *see Complete Auto Transit, Inc. v. Brady*, *supra*, Texas clearly provided sufficient benefits to Mr. Hughes to authorize its taxation of his estate, especially since Texas has not already taxed those benefits through income taxation. Thus even were a state such as California able to demonstrate a similar entitlement to taxation and thus monetary damage from the proper imposition of another state's taxes, this Court would have no basis for injecting itself into adjudications of state law in

derogation of the proper jurisdiction of the various states. *See In re Rapoport's Estate*, 26 N.W.2d 777 (Mich. 1947), *cert. denied*, *California v. Michigan State Board of Escheats*, 332 U.S. 764 (1947) (escheat of out-of-state decedent's property); *Nelson v. Miller*, 201 F.2d 277, 280 (9th Cir. 1952).

In light of the conflict of *Texas v. Florida* with these principles of law, as well as its dissimilarity to other original actions, this Court should not extend its application to cases in which the defendant state objects to federal litigation. Since all States in *Texas v. Florida* were apparently willing to have this Court adjudicate matters of their local law, that case need not and should not be extended to cases in which a state has not abdicated its sovereign jurisdiction. *Cf. Vogel v. New York Life Ins.*, 55 F.2d 205, 208 (5th Cir. 1932), *cert. denied*, 287 U.S. 604 (1932) (state jurisdiction must be affirmatively asserted).

IV. ABSTENTION DOCTRINES DEVELOPED BY THIS COURT SUBSEQUENT TO TEXAS V. FLORIDA IMPEL THE DENIAL OF CALIFORNIA'S MOTION FOR LEAVE TO FILE COMPLAINT.

State courts are effective forums for the adjudication of tax claims against local assets of an estate. Therefore, the abstention doctrine developed since *Texas v. Florida* requires this Court to leave the jurisdiction of those forums undisturbed out of "scrupulous regard for the rightful independence of the state governments." *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 501 (1941). The proper distribution of local property of a decedent is an exercise of the power of "States and their institutions . . . to perform their separate functions in their separate ways." *Judice v. Vail*, 430 U.S. 327, 334 (1977), citing *Huffman v. Pursue, Ltd.*, 420 U.S.

592 (1975); *Younger v. Harris*, 401 U.S. 37 (1971). This Court has refused to disrupt "suits by the State in its sovereign capacity" and thereby to imply a "negative reflection on the State's ability to adjudicate" when questions of federal law were at issue. *Trainor v. Hernandez*, 431 U.S. 434, 446 (1977). This case presents a stronger basis for absention since it involves only issues of fact and of state law, for

> State courts are quite as capable as federal courts of determining the facts, and they alone can define and interpret State law.

Schlesinger v. Councilman, 420 U.S. 738, 755 (1975); *Texas v. Florida*, *supra* at 431 (Opinion of Frankfurter, J.). A state's administration of a decedent's property, including distributions to satisfy valid tax judgments, is equally entitled to federal abstention as matters of domestic relations in *Williams v. Williams*, 532 F.2d 120 (8th Cir. 1976), for the former also "has traditionally been the province of the states." *Id.* at 122; *see Nelson v. Miller*, *supra*. Consequently, this case is one in which "federal judicial interference with state civil functions" is inappropriate. *Huffman v. Pursue, Ltd.*, *supra* at 603.

In *Ohio v. Wyandotte Chemicals Corp.*, *supra*, it was recognized that, with respect to cases between a state and a citizen of another state over matters such as a decedent's estate,

> [i]t would, indeed, be anomalous were this Court to be held out as a potential principal forum for settling such controversies . . . [M]uch would be sacrificed, and little gained, by our exercising exclusive jurisdiction over issues bottomed on local law.

Id. at 497. While *Wyandotte* did not concern a suit between states, the standard presented therein is

properly applicable to any original action. Abstention in this case "would not disserve any of the principal policies underlying the Article III jurisdictional grant and . . . the reasons of practical wisdom" supporting abstention are consistent with the proper allocation of this Court's resources. *Id.* at 499. As discussed above, disputes regarding state taxation are not within the policies underlying the Article III jurisdictional grant. Furthermore, the "reasons of practical wisdom" leading to a denial of jurisdiction are stronger here than in *Wyandotte*.

First, resolution of the issue of Hughes' domicile at death would require a substantial expenditure of time and resources by this Court. Even with the aid of a special master, the factual morass which must be traversed in order to decide this question of local law would inevitably sap a significant amount of the Court's energies.[13] As this Court has stated, by such an expenditure of time on factual determinations and issues of local law,

> we would unavoidably be reducing the attention we could give to those matters of federal law and national import as to which we are the primary overseers.

Id. at 498.

---

[13]The ongoing trial in Houston was preceded by seventeen months of discovery during which Texas gathered, organized and reviewed for trial more than fifty thousand documents relevant to Hughes' domicile. Scores of motions were filed, briefed and ruled upon; numerous hearings were held; countless witnesses were interviewed; and more than fifty depositions were taken. In preparation for trial, approximately twenty-five thousand documents were marked by the various parties for possible use as evidence. With nation-wide subpoena power at the parties' disposal, a trial before this Court can reasonably be expected to entail the production of considerably more evidence and no fewer procedural disputes for the Court's review.

Second, an exercise of jurisdiction by this Court would not obviate the necessity for state court proceedings to distribute local assets of the estate. In the instant case four states are in the process of exercising their well established power to distribute local assets of a decedent. These actions are at lease in part *in rem. E.g., TEX. PROB. CODE* §2(e). This Court should deny leave to file, for it is fundamental that "the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other." *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 466 (1939); *United States v. Bank of New York Co., 296 U.S. 463 (1936); Rosseau v. United States Trust Co. of New York*, 422 F.Supp. 447 (S.D.N.Y. 1976). *See Judice v. Vail, supra* at 335. Furthermore, in light of these proceedings, this Court's resources would be committed

> to the task of trying to settle a small piece of a much larger problem that many competent adjudicatory . . . bodies are actively grappling with on a more practical basis.

Ohio v. Wyandotte Chemicals Corp., supra at 503. The trial level capabilities of this Court, when forced "awkwardly to play the role of factfinder without actually presiding over the introduction of evidence," *Id.* at 498, are such that the state courts are better equipped to decide this domicile issue.

A decision of this Court regarding the domicile of Mr. Hughes could affect only the power to tax the succession of intangible assets of the estate. *Treichler v. Wisconsin, supra; Frick v. Pennsylvania, supra.* As discussed above, these intangibles consist primarily of stock in a Delaware corporation. The corporation has brought an interpleader action in the courts of Delaware in order to

ascertain the proper distribution of the stock. This pending action provides an opportunity for all interested parties to present their claims to a neutral arbiter, thus satisfying one of the "principal policies underlying the Article III jurisdictional grant...." *Ohio v. Wyandotte Chemicals Corp.*, supra at 499; *Chisolm v. Georgia*, 2 Dall. 419, 475-76 (1793). Accordingly, Delaware provides an alternative and more effective forum "in which the *issues* tendered here may be litigated," and this court should decline to exercise its jurisdiction. *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976); *Ohio v. Wyandotte Chemicals Corp., supra; Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 464-65 (1945); *Massachusetts v. Missouri, supra.*

The administration of Texas law by its courts and officers is entitled to deference by this Court. Incident to the orderly administration of Mr. Hughes' estate, Harris County Probate Court No. 2 must decide the question of domicile at time of death. Such a determination is a jurisdictional prerequisite to the original probate of any will, as well as the ascertainment of the proper distribution of property located in Texas. *See Holland v. Jackson*, 37 S.W.2d 726 (Tex. 1931); *In re Estate of Bills*, 542 S.W.2d 943 (Tex.Civ.App.-Texarkana 1976, writ ref'd. n.r.e.). If that court determines that Mr. Hughes was a Texas domiciliary at the time of his death, Texas law would require its officials to collect inheritance taxes. TEX.TAX.GEN. art. 14.01; *see* TEX. PROB. CODE §410. Where state law requires an officer to pursue a tax claim, this Court should not "disable him from performing his obligations to the State." *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 108 (1861). This principle is especially applicable to the present case since any decision by this Court which would affect the duties of Texas officials would be based upon an unwarranted determination of Texas law by

this Court at the behest of a state which does not seek recovery on the basis of its own sovereign claim. Just as another state's judgment for taxes cannot "demand priority over domestic claims for taxes," *Milwaukee County v. White Co., supra* at 276, this Court should not require Texas to give priority to a mere contractual claim of another state. *See also Thompson v. Whitman*, 18 Wall. 457 (1873).

CONCLUSION

The well established rights of the states to administer the local assets of a decedent's estate and to prosecute state tax claims in their own courts merit the continued respect and protection of this Court. An abridgement of these rights must not be permitted on the basis of allegations that harm of some unknown magnitude *might* occur at some future time, especially at the behest of a state which is not proceeding solely upon the basis of its own sovereign claim. Due to the posture in which California comes to this Court, and for all of the foregoing reasons, California's Motion for Leave to File Complaint should be denied.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

LEE C. CLYBURN
Admin. Asst. Attorney General

RICK HARRISON
Special Asst. Attorney General

DAVID DEADERICK
Assistant Attorney General

RICK ARNETT
Assistant Attorney General

LEE C. CLYBURN

Attorneys for Defendant

CERTIFICATE OF SERVICE

I, Lee C. Clyburn, a member of the Bar of the Supreme Court of the United States, do now enter my appearance in the Supreme Court of the United States in the above mentioned cause on behalf of the Defendant. I do hereby certify that nine copies of the foregoing Brief in Opposition have been served on Plaintiff by placing three copies of same in the United States Mail, First Class, Certified and Postage Prepaid, on this the 13th day of January, 1978, addressed to each of the following:

Honorable Jerry Brown
Governor California
State Capitol
Sacramento, California

Honorable Evelle J. Younger
Attorney General of California
800 Tishman Building
3580 Wilshire Boulevard
Los Angeles, California 90010

Honorable Jerome B. Falk, Jr.
Howard, Prim, Rice, Nemerovski,
Canady & Pollak
The Hartford Building
650 California Street
San Francisco, California 94108

LEE C. CLYBURN

APPENDIX

Supreme Court, U.S.
FILED
JAN

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. 76, ORIGINAL

* * *

STATE OF CALIFORNIA,

Plaintiff,

V.

STATE OF TEXAS,

Defendant

* * *

ON MOTION FOR LEAVE TO FILE COMPLAINT

* * *

BRIEF IN OPPOSITION

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

LEE C. CLYBURN
Admin. Asst. Attorney General

RICK HARRISON
Special Asst. Attorney General

DAVID DEADERICK
Assistant Attorney General

RICK ARNETT
Assistant Attorney General

Attorneys for Defendant

INDEX TO APPENDICES

Page

APPENDIX A. Letter from Executive Officer of the California Franchise Tax Board to Deputy Comptroller of Public Accounts of the State of Texas A-1

APPENDIX B. Press Release by California Controller Ken Cory Announcing the Agreement with the Hughes Estate and the Filing of this Suit B-1

APPENDIX C. Letter from California's Counsel Jerome B. Falk, Jr. to the Honorable Michael Rodak, Jr. re Submission of California's Application for Temporary Restraining Order and Preliminary Injunction C-1

APPENDIX D. Partial Transcript of Hearing in Harris County Probate Court No. 2 on December 19, 1977, Consisting of all Testimony by William Rice Lummis Relevant to the Agreements Between California and the Hughes Estate D-1

APPENDIX E. Agreement Provisionally Compromising Death Tax Claim of the State of California E-1

APPENDIX F. Letter Agreement Between Counsel for the Nevada Administrator of the Hughes Estate and Counsel for California F-1

APPENDIX A

STATE OF CALIFORNIA

FRANCHISE TAX BOARD

SACRAMENTO, CALIFORNIA 95867

Telephone: (916) 355-0292

January 21, 1977

RECEIVED
STATE COMPTROLLER
JAN 25 1977
REVENUE PROCESSING
AUSTIN, TEXAS

Randall B. Wood
Chief Clerk
Deputy Comptroller
Comptroller of Public Accounts
State of Texas
Austin, Texas 78774

RE: Howard Hughes

About ten years ago, we were concerned about the question of Mr. Hughes' California residency status. An investigation was conducted at the time which went so far as to include checking flight logs. It was determined that Hughes was not a resident of California and was not required to file California personal income tax returns.

We maintain personal income tax returns in our files for the statutory period of four years. Any returns that may have been filed by him for the years 1935 through 1966, therefore, have been destroyed.

I am sorry we cannot be of more help to you.

S/S

Martin Huff
Executive Officer

APPENDIX B

OFFICE OF THE CONTROLLER
Kenneth Cory
State Capitol
Sacramento, California

For release November 11, 1977
and thereafter

CONTACT: Carl D'Agostino
(916) 445/2638

SACRAMENTO—State Controller Ken Cory, acting to prevent California from losing its rightful share of the inheritance taxes on the Howard Hughes estate, today announced agreement on one phase of the complex issue and filed suit in the U.S. Supreme Court of another.

Cory revealed that legal officials for the Controller's Office and representatives of the heirs have agreed to a settlement comprising 18% of the Hughes estate, conditioned on the fact that the U.S. Supreme Court judges Hughes was not a resident of Texas.

The Hughes heirs have insisted that Hughes was, before his death last year, a resident of Nevada. Nevada has no state death taxes.

"This agreement means that California agrees to reduce from slightly less than 24% to 18% its claim against the estate, based on the agreement that the Hughes heirs will not contend in the Supreme Court that the eccentric businessman was domiciled in Nevada," said Cory.

Attorneys for the Controller noted that the agreement is conditioned on the U.S. Supreme Court agreeing to decide the controversy between the states of California and Texas. Texas contends that Hughes was a Texas resident and is seeking what amounts to an inheritance tax of 16% on the estate.

The heirs have placed the value of the Hughes estate at $167,000,000. The Internal Revenue Service is presently making an independent determination of value. The IRS value figure will be the basis for California's inheritance tax claim.

"Since three states have claimed Mr. Hughes was a resident of their respective state, we have in good faith reduced our potential claim of 24% to 18% to return for the elimination of one of the contending states," said Cory.

"This agreement is effective only if Texas is judged not to be the Hughes residence," he added. "If Texas should eventually prove the winner in the court test, then California would still retain a claim of 2%," Cory noted.

Since the issue raised by Cory is a dispute between states, the Controller's suit contends the matter is within the original jurisdiction of the U.S. Supreme Court.

Hughes, who died on a charter flight rushing him from Mexico to Texas on April 5, 1976, had been a resident of California virtually continuously from 1926 to 1966. During the 40 year span he amassed a fortune in business dealings ranging from film production to aviation. Hughes was born in Texas in 1905, but moved to California at the age of 20 and only returned to Texas briefly at times during 1933, 1938 and 1949.

From 1966 until his death Hughes traveled a nomadic existence, living at times in Nevada, the Bahamas, Nicaragua, Vancouver, London and eventually, Acapulco, Mexico. His staff—at his wish—shielded him in hotel rooms and he was seldom, if ever, seen in public.

"What we seek by today's suit is final court resolution of where Mr. Hughes lived or intended to live. If federal,

California and Texas death taxes against the estate are honored, the claims will virtually match the estimated value of the estate," Controller Cory noted.

The Cory suit alleges that the states of Texas and California are on a "collision course" which can only be resolved by a Supreme Court decision.

Cory's suit also claims that after Hughes departure from California in 1966 "he formed no personal roots ... living in almost total seclusion in a hotel room from which he seldom, if any, ventured."

Cory also contends that "the usual signs of where one lives permanently or intends to live are not present in this case because of the particular life and travel style of Howard Hughes."

The Cory suit is intended to get the matter before the federal tribunal so that the issue of whether California or Texas will collect an inheritance tax can be clearly resolved.

"We are prepared to show in the U.S. Supreme Court our reasons for believing Howard Hughes was domiciled in California and that the division of his estate ought to reflect that fact," concluded Cory.

APPENDIX C

LAW OFFICES OF
HOWARD, PRIM, RICE, NEMEROVSKI,
CANADY & POLLAK
A PROFESSIONAL CORPORATION
THE HARTFORD BUILDING-650 CALIFORNIA STREET
SAN FRANCISCO 94108
[415] 434-1600
TWX 910-372-7214

HENRY W. HOWARD
WAYNE L. PRIM
DENIS T. RICE
HOWARD N. NEMEROVSKI
RICHARD W. CANADY
STUART R. POLLAK
A. JAMES ROBERTSON II
JEROME B. FALK, JR.
RAYMOND P. HAAS
STEPHEN M. TENNIS
ROBERT E. GOODING, JR.
R. L. SMITH McKEITHEN
FRED H. ALTSHULER
STEVEN L. MAYER
NICHOLAS J. HONCHARIW
KELLEY GUEST
DIRK M. SCHENKKAN
ANN V. BRICK

ROBERT H. MNOOKIN
OF COUNSEL

November 13, 1977

Hon. Michael Rodak, Jr.
Clerk, Supreme Court of the
United States
Washington D.C. 20543

Re: *California* v. *Texas*
No. 76, Original

Dear Mr. Rodak:

Enclosed is an Application for Temporary Restraining Order and Preliminary Injunction for submission to Mr. Justice Powell, as Circuit Justice for the Fifth Circuit.

I am uncertain whether this Application is governed by the first or second sentence of Rule 35(2). It was a practical impossibility to have it printed over the weekend, and we felt it should be filed and submitted on Monday, November 14, 1977. If you determine that it should be printed, please telephone me collect on Monday, November 14, and I will have it printed immediately, in which event I hope you will nevertheless feel it appropriate to submit it in typewritten form pending substitution of the printed application.

In the expectation that in one way or the other the typewritten application will be submitted, I have enclosed an original and nine copies, the latter for the purpose of providing for the possibility that Justice Powell may elect to refer it to the entire Court.

As noted in the Application, an application for relief is expected to be made by attorneys for the Estate of Howard R. Hughes, Jr. to the Texas court on Monday, November 14. *Please do not submit the instant Application to Mr. Justice Powell until I advise your office by telephone as to the disposition of that application.*

Sincereley,

S/S
JEROME B. FALK, JR.

cc: Governor of Texas
Attorney General of Texas

APPENDIX D

CAUSE NUMBER 139,362

The Estate Of	In The Probate Court
Howard Robard Hughes, Jr.	Number Two Of
Deceased	Harris County, Texas

HEARING ON APPLICATION FOR AUTHORITY TO PAY AMOUNTS DUE FOR SERVICES RENDERED BY MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC., REAL ESTATE RESEARCH CORPORATION, HASKIN AND SELLS, BROWN, WOOD, IVEY, MITCHELL & PETTY AND PATTON, BOGGS & BLOW

BE IT REMEMBERED that on the 19th day of December, 1977, came on for hearing the above entitled and numbered cause before the Honorable Pat Gregory, Judge of the Probate Court No. 2, Harris County, Texas; and all parties appearing in person and/or by counsel, announcement of ready having been made, and all preliminary matters having been disposed of, the following proceedings were had, viz.

APPEARANCES

Andrews, Kurth, Campbell & Jones
Attorney at Law
2500 Exxon Building
Houston, Texas

By: Frank Davis, Esq.
Thomas Schubert, Esq.
William T. Miller, Esq.

Attorneys for Temporary Co-Administrators Offices

Offices of the Attorney General of Texas
Supreme Court Building
Box 12548
Austin, Texas

By: John Hill, Esq.
Bert W. Pluymen, Esq.

Attorneys for State of Texas

Fisher, Roch & Gallagher
Attorneys at Law
Two Houston Center
Houston, Texas

By: Robert H. Roch, Esq.
Craig Lewis, Esq.

Attorneys for Avis Hughes McIntyre and Rush Hughes

Bracewell & Patterson
Attorneys at Law
2900 South Tower
Pennzoil Place
Houston, Texas

By: Ms. Susan Brandt
Mr. Kerry Blair

Attorneys for Barbara Cameron, Agnes Roberts and Elspeth DePould

Butler, Binion, Rice, Cook & Knapp
Attorneys at Law
Esperson Building
Houston, Texas

By: O. Theodore Dinkins, Jr., Esq.
Ms. Linda L. Kelly

Attorneys Ad Litem for the Unknown Heirs of Howard Robard Hughes, Jr., Deceased

Brown, Wood, Ivey, Mitchell & Perry
One Liberty Plaza
New York, N.Y.

By: James B. May, Esq.
Joseph G. Riemer, III, Esq.

Attorneys for Merrill, Lynch, Pierce, Fenner & Smith

[Skipping to the pertinent testimony of Mr. Lummis]

WILLIAM R. LUMMIS,

having been previously duly sworn and cautioned on his oath, resumed the stand and testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. DAVIS:

Q State your name again, please, sir, for the record.

A William R. Lummis.

Q Mr. Lummis, you are one of the Co-Administrators of the estate here in Texas?

A Yes, I am.

Q And then you are Co-Administrator in other jurisdictions as well?

A Yes. I am Co-Administrator in Nevada, Ancillary Administrator in Delaware and Provisional Administrator in Louisiana.

Q In such capacity as Administrator, have you sought and made an agreement with counsel for the State of California in regard to a settlement, a possible settlement, of the claims of California against this estate in regard to inheritance taxes?

A Yes. We have provisionally made such an agreement.

Q And has that agreement been presented to this Court?

A Yes, it has.

Q Who has entered into that agreement, please, sir, other than yourself?

A The agreement is entered into by all the administrators of the estate and by the heirs at law of Mr. Hughes.

Q What was the reason for entering into such a provisional agreement with the State of California, if you will briefly tell us?

A The background of it is that shortly after Mr. Hughes' death and due to the location of his assets, as administrations were initiated in Nevada, Texas, and California simultaneously, subsequently also in Delaware and Louisiana, the administrators, after investigating the facts that were available to them, arrived at the conclusion that Mr. Hughes, at the time of his death, was domiciled in the State of Nevada.

In July, 1976, however, the Attorney General of Texas decided to take the position that Mr. Hughes was domiciled in Texas and, therefore, than an inheritance tax with respect to his estate would be due the State of Texas.

About a year later, in this past summer, in July, 1977, after filing an inheritance tax return in the State of California, in which it was indicated that the administrators took the position Mr. Hughes

was domiciled in Nevada, the State of California notified us that it was going to take the position that Mr. Hughes, at the time of his death, was domiciled in either the State of California or possibly the Bahamas, in either of which case the State of California would assert an inheritance tax.

The Co-Administrators were then on the horns of a dilemma, in that the proceedings are already set in Texas by which the Attorney General would attempt to establish Texas as Mr. Hughes' domicile, and it became apparent to the administrators that the possibility existed that a judgment would come down in the State of Texas to the effect that Mr. Hughes was domiciled and his estate taxable in Texas, which judgment would not be binding upon the State of California; that in a similar proceeding in California, a judgment would come down in a California court to the effect that Mr. Hughes was domiciled and his estate would be taxable in the State of California.

Texas has a sixteen percent inheritance tax. The Federal Government has a seventy-seven per cent inheritance tax, and even allowing for the full credit for the state death taxes paid, if California were also to be successful in establishing its tax, the estate would be confronted with the unhappy circumstances of owing taxes at the rate of one hundred one percent.

The administrators obviously had to take whatever steps they felt could be taken to prevent this result in an effort to preserve the estate for the creditors of the estate and whoever might ultimately own it.

We, therefore, entered into an agreement with

the State of California which achieves the result that we sought. Under that agreement, which is a provisional agreement—and I will go into it later—under that agreement, the administrators agreed to pay an eighteen per cent inheritance tax to the State of California, but the net effect of that agreement is that the estate, rather than incurring a possibility of a total of one hundred one per cent tax, has limited its exposure to a total of seventy-nine per cent. In view of that, we feel that the agreement is certainly one that is in the best interests of the estate. The agreement is provisional in that it is to become effective only if the Supreme Court of the United States agrees to take jurisdiction of the matter to determine whether or not Mr. Hughes was domiciled in Texas at the time of his death.

It is also conditioned upon the approval of this Court, the Court in Nevada, which has been obtained, the Court in California and the Court in Louisiana. Proceedings have been initiated in those courts to obtain their approval.

It is also contingent upon the execution of the heirs of Mr. Hughes, all of whom, with the exception of two, have executed the agreement. As to those two, the State of California, as is permitted under the agreement, has waived their signatures.

The agreement is also contingent upon our being able to obtain from the Internal Revenue Service a ruling to the effect that State death taxes paid to California under that agreement would qualify for the state death tax credits permitted against the Federal estate tax under the Internal Revenue Code.

I think that basically is the background for the

agreement and basically sets forth the agreement. I would like to go one step further and say that for the additional two per cent tax, that the administrators have agreed to incur and a great deal of insurance has been obtained for the administration of this estate.

To say nothing of the differential in rates, which I have already mentioned, California agrees by this agreement to be bound for evaluation purposes by values which are ultimately established for the Federal estate tax.

In the absence of this agreement, it would be possible for this estate to have to go through three extremely lengthy litigations: In Texas, before the Internal Revenue Service and in the State of California. It would be forced to go through these litigations on the sole issue of valuation. This litigation would be extremely expensive and needlessly consume its assets.

So for all of those reasons, I feel strongly that this agreement ought to be approved. The agreement also recognizes possibilities that there may be charitable beneficiaries, or something of that nature, and provisions made for those.

Q If this agreement is approved by the Court, as I understand it the agreement can still be scuttled or terminated if the Supreme Court does not take the case. Is that correct, sir?

A That is correct. It would be null and void in that case.

Q And the State of California has filed a Motion for Leave to file a complaint with the Supreme Court, and that is pending at this time?

A That is correct.

Q Do you know when the State of Texas is due to Answer that complaint, or whether or not they have Answered it at this time?

A I do not believe that they have Answered it. I am not sure when they must.

Q If the domicile question is determined by the Supreme Court, that is, that Texas is not the domiciliary state, then this agreement provides that the estate will pay California eighteen percent. Is that right, sir?

A That is correct.

Q Was there any provision in the agreement for California taking payment in kind in some respects? I know during part of these meetings that I was involved in, that was discussed. Was that ever incorporated in the agreement?

A Well, my recollection is that the agreement does permit payment in installments, but I do not know—I do not recall whether the final draft included payment in kind, but it does permit payments in installments. And, of course, as to that eighteen per cent payable to the State of California, sixteen per cent would be allowed as a credit against the Federal estate tax.

Q And have we agreed with California that we will furnish them with various information they could get, and in some instances had already obtained, such as depositions and this sort of thing, to help them in their case since they are, we think, conferring a benefit upon the estate?

A That is correct. We have made such an agreement.

Q And the only court so far to whom this agreement has been presented has been the one in Las Vegas. Is that right, sir?

A That is correct.

Q And is there any time set for presentation of this to the court in Louisiana and California?

A I am not aware of the scheduling. I know that application has been made.

MR. MILLER: May I respond to that question?

They are having the California hearing today on the agreement, it's my understanding, Your Honor, and the Louisiana hearing would be after the first of the year.

Q (By Mr. Davis) And you do ask the Court to approve this provisional settlement?

A I do.

MR. DAVIS: Thank you. Pass the witness, Your Honor.

THE COURT: Mr. Dinkins?

CROSS EXAMINATION

QUESTIONS BY MR. DINKINS:

Q Mr. Lummis, your counsel, in connection with negotiations of this agreement, is the law firm of Andrews, Kurth, Campbell & Jones of this city. Isn't that correct?

A Yes.

Q In which of your fiduciary capacities does that law firm represent you?

A The law firm represents me in all my fiduciary capacities.

Q It's my recollection that the Andrews, Kurth law firm also represents other members of your family in their individual capacities.

Could you please state those for us?

A Well, the firm represents my mother and various others in the family, in various litigations.

Q Well, what litigation are you referring to?

A I am referring primarily now to the litigation that is ongoing in Nevada, in the contest of the will offered for probate in that state.

Q In other words, they represent other members of, I guess, the maternal side of the family?

A That is correct.

Q In their individual capacities in connection with this will contest litigation?

A Yes.

Q In connection with the position that you have taken for quite some time in this court, the position that Nevada was, in fact, the legal domicile of Mr. Hughes at the time of his death, one of the factors that assume influenced your decision was that issue of double taxation; in other words, the possibility of double taxation.

Are there any other factors—and now I am talking more from a legal standpoint than a factual standpoint—that you can name and—

A Let me interrupt by saying that your assumption is incorrect.

Q I am sorry.

A The issue of double taxation did not enter into my—into the determination that I made as to where Mr. Hughes was domiciled. That decision was made based upon the facts as we have found them, as to where, based upon those facts, Mr. Hughes was domiciled. It was in no way based upon the possibility of double taxation in these other two states.

Q Well, the bulk of the litigation that has been before this court in connection with the domicile claim has related to inheritance taxation. Is that correct?

A Yes.

Q It is my understanding that under the laws of the State of Nevada, there is a different scheme of intestate distribution wherein your mother would be the sole beneficiary of Mr. Hughes' estate.

Does that comport with your understanding?

A That does.

Q Is it your testimony, then, that the determination of Nevada domicile was made without regard to whom might ultimately be entitled to share the assets of the estate under one scheme of inheritance or another? Is that correct?

A I believe that the settlement agreement subsequently reached strongly supports that.

Q Do you recall ever having had any discussions with anyone as to the adverse effect of a determination of Texas domicile in the event some legitimate heir would later appear on the scene, who was not a party to that settlement agreement?

A I don't recall any discussions about it, but I might have recognized it if that is the case.

Q But your testimony is that that contingency played absolutely no part in the domicile position that either your mother as a contestant or you and your mother as temporary administrators have taken before this Court?

A Yes. I am saying to you, to make it perfectly clear, that the effect of the statutes of descent and distribution in the various states, neither those statutes nor the tax statutes played any material role in the determination by the administrators as to where Mr. Hughes was domiciled.

Q It's my understanding of the import of the agreement that the only thing pending before the United States Supreme Court is a determination of domicile for inheritance tax purposes, but that a domiciliary determination for the purposes of intestate distribution and a domiciliary determination for the purposes of determining which state court should be the domiciliary administration in Mr. Hughes' estate is not before the Supreme Court?

A That is correct.

Q Does that comport with your understanding?

A Yes.

MR. DINKINS: Your Honor, could I confer just briefly with Mr. Miller?

(Counsel conferred.)

MR. DINKINS: Thank you, Your Honor.

If it please the Court, I noticed on Page 7 of the application for approval of agreement comprising death tax claims of the State of California, little "i", the first paragraph it says:

"The agreement expressly provides the parties are compromising the inheritance tax claim and are neither making an admission nor purporting to agree as to the state of which decedent was a domiciliary, either for administration or for inheritance tax purposes."

MR. DINKINS: Mr. Miller and I are agreed that the word "tax" should be deleted from that sentence so the sentence would read:

"...of which a decedent was a domiciliary either for administration or inheritance purposes."

We believe that correctly reflects the intent of the agreement.

MR. MILLER: And I would like to so amend the petition to strike the word.

THE COURT: You have to file a trial amendment.

MR. DINKINS: No objection to his trial amendment, Your Honor.

THE COURT: Mr. Pluymen?

MR. PLUYMEN: Your Honor, if a written motion is filed we will respond to it. Are you speaking specifically to the amendment?

THE COURT: Your witness.

MR. PLUYMEN: Excuse me?

THE COURT: Your witness. Mr. Dinkins is through examining the witness. It is your witness.

MR. PLUYMEN: Excuse me, Your Honor. I misunderstood the Court.

CROSS EXAMINATION

QUESTIONS BY MR. PLUYMEN:

Q Mr. Lummis, would you reiterate, if you would, in which states you have any capacity in regard to Mr. Howard Hughes and what those capacities are?

A In Texas I am a Temporary Co-Administrator; in Nevada, I am called a Co-Special Administrator; and in Delaware, I am Ancillary Administrator; and in Florida, I am Provisional Administrator.

Q Did you make application, sir, to obtain all those positions?

A Yes.

Q In any of those positions at any time in any court, have you ever pled that the state of California is Mr. Hughes' domicile?

A No.

Q Is it not correct, sir, that in all your capacities

whenever you have had occasion to plead domicile, you have pled the domicile of Howard Hughes to be the State of Nevada?

A That is correct.

Q The agreement which you are asking this Court to approve, what did that agreement state, in your understanding, as to who gets paid and how much, in terms of taxes, if the United States Supreme Court finds the State of Nevada to be Mr. Hughes' domicile at death?

A If the Supreme Court finds that the State of Nevada was the domicile of Mr. Hughes at the time of his death, California receives eighteen per cent of the tax subject, however, to a ruling to the effect that that tax qualifies for a credit against the Federal estate tax.

Q Did I understand you to say that the State of California receives the eighteen per cent?

A Yes, that is correct.

Q Is that in excess of the amount of tax that will be due ordinarily if the State of Nevada were determined to be the domicile at Mr. Hughes' death?

A Yes. It is two per cent in excess of the total tax that would be due if Mr. Hughes were found domiciled in Nevada.

Q And what is your understanding of the agreement that you are asking this Court to approve? Who would be paid, and how much would they be paid, if the United States Supreme Court decides that the State of Texas is the domicile of Mr. Hughes at death?

A In the event, the State of Texas would receive sixteen per cent; the State of California, two per cent.

Q The State of California would still get two per cent?

A That is correct.

Q And you had never, anywhere at any time, pled that the domicile of Howard Hughes was the State of California. Is that correct?

A That is correct.

Q And what is your understanding of this agreement in terms of what position you have agreed to take in this agreement in the United States Supreme Court should this agreement be approved?

A We have not determined what position we are going to take, except to take the position that we have always taken, and that is that in the late 1920's, Mr. Hughes abandoned his Texas domicile and acquired a domicile of choice in California and we will also present it is my prediction, evidence we have that in 1966 Mr. Hughes abandoned his California domicile and acquired a domicile choice of Nevada.

Q In answer to Mr. Davis' questions, you referred to a quote "agreement to help California" unquote pertaining to depositions, information, et cetera?

A That is correct.

Q Would you please enlighten me as to whether that is a written agreement; if so, where it is?

A I don't know if it is a written agreement. Frankly, I can't recall. I am familiar with the agreement, nonetheless.

Q Have you seen that agreement in writing?

A I saw drafts of it, but I was in Nevada. I do not know what that agreement looks like right now.

Q In other words, you are speaking of an agreement that is totally separate from the application of the agreement you are requesting this Court to approve today?

A Yes.

Q And you have just seen drafts of that agreement, but have not seen the final. Is that correct?

A I am familiar with the substance of it, but I have not seen it.

Q Has that been signed by any of the administrators in Texas or by any of the heirs, that second agreement you are talking about?

A No, not to my knowledge.

Q Do you know where we could obtain a copy of that agreement? It seems to be highly relevant to the agreement that we have before us.

A You might ask Mr. Miller and Mr. Davis about it. I could testify as to the substance of it.

Q If you would, in your own words, please testify as to the substance of that agreement, as far as you can recall.

A I believe the substance of the agreement is that if the United States Supreme Court takes jurisdiction of this matter, we will assist California in establishing the position that I have just mentioned: One, that Mr. Hughes abandoned his Texas domicile and acquired a domicile of choice in

California at one point; two, that in 1966 they will also have what we have developed that Mr. Hughes abandoned his California domicile and acquired a Nevada domicile.

Q You will help the State of California, as well, to establish Nevada domicile in the United States Supreme Court?

A We reserve the right in the agreement to present in the Supreme Court all of the evidence that we have with respect to Mr. Hughes; domicile.

Q Is that the agreement which you are holding in your hand there?

A Yes, it is.

Q Would you mind if I took a look at it?

MR. DAVIS: Fine.

MR. PLUYMEN: Mr. Davis, if you do have another copy I would like to have that marked as an exhibit.

MR. DAVIS: Go right ahead.

MR. PLUYMEN: Please mark that State's Exhibit No. 5. No, it will have to be State's Exhibit No. 7.

(State's Exhibit No. 7 was marked for identification by the reporter.)

Q (By Mr. Pluymen) Mr. Lummis, let me hand you what had been marked as State's Exhibit No. 7, and ask you to identify it.

A I will have to read it. As I have testified, I haven't.

Q That will be fine, sir.

A This is a letter, dated November 10, 1977, from Messrs. Ronald E. Gother, John W. Armogost, and William T. Miller, to Mr. Jerome B. Falk, Jr.

Q Does this letter reflect that written agreement that you referred to earlier, which is an addition to the agreement that is before the Court?

A Yes.

Q And what is your understanding of that agreement, sir?

A Well, the agreement—

Q Reflected in State's Exhibit 7.

A Well, the agreement outlines the degree to which and the manner of cooperation that has been agreed to in the event that the Supreme Court accepts jurisdiction between the parties to the agreement.

Q Would you please explain to the Court your understanding of your obligations under State's Exhibit No. 7?

A I would rather answer the question by referring to the letter. I could read it. If you would like me to read the letter, I will do it, but, as I understand it, it is already part of the record and the letter says what it says.

Q Does that correctly reflect the obligations which you consider yourself to have?

A Yes.

Q Mr. Lummis, are there any other written agreements that you are aware of?

A No.

Q Anything pertaining to the agreement in the United States Supreme Court and the one before the Court today?

A No.

Q Are there any unwritten agreements of which you are aware?

A No.

MR. PLUYMEN: Your Honor, if I might take a minute I would like to read this myself.

(Pause.)

Q (By Mr. Pluymen) According to this letter, Mr. Lummis, you have agreed with the State of California to provide the State of California with all documentary material you have collected to date. Is that correct? Was that your understanding?

A Under the various conditions set forth in the letter, yes, and at the various times set forth.

Q But even prior to the time the United States Supreme Court rules on California's petition for leave to file a complaint, even prior to that time you will provide the state of California with all materials that you have collected pertaining to Mr. Hughes' domicile. Is that correct?

A No. I believe it says "certain material."

Q All material pertaining to your claim which you mentioned just a moment ago, that Mr. Hughes' effective domicile was California.

A Oh, yes, that is correct.

Q And once the United States Supreme Court takes the case, if it should so do, then you will provide the State of California with all factual and legal analysis which you prepared regarding your claim that Hughes was Nevada domiciliary, including depositions and legal memoranda, written analyses of any local and factual issues bearing on the domicile questions; in other words, at that point you will provide them with all material pertaining to your claim that Mr. Hughes abandoned California and moved to Nevada and effected his choice of domicile there. Is that correct?

A That is my understanding of what it says.

Q And, in addition, attorneys from your office will be made available for consultation with the State of California in aid of California's litigation against Texas. Is that correct?

A That is correct.

Q In the United States Supreme Court?

A Yes.

Q All this aid which you have reflected in State's Exhibit No. 7, that is definitely a benefit to the state of California—that is my statement—and you also promised to pay the State of California, in the agreement before the Court, eighteen per cent of the estate even if Nevada is determined to be the domicile; two per cent if the State of California is determined to be the domicile; and you have not pled California domicile anywhere at any time.

Would you please tell the Court what possible benefit accrues to the estate by your giving away two per cent of the estate, in addition to all the other

help you are giving the State of California?

A I certainly will. The question as to where Mr. Hughes was domiciled cannot be answered with absolute certainty. In the absence of this agreement, as I have already indicated, the administrators of this estate could possibly be administering and estate that could incur death tax liability of one hundred two per cent of the estate. By entering this agreement, this additional two per cent, we establish the maximum death tax rate applicable to this estate at seventy-nine per cent. The California inheritance tax rate is twenty-four per cent. I think it is quite clear what benefit is derived from this agreement by the estate. As a matter of fact, I think it would be highly improper and negligent of the administrators not to make an agreement of this type.

Q Isn't it correct, Mr. Lummis, that the State of California has a petition for leave to file a complaint pending before the United States Supreme Court?

A Yes, sir.

Q And isn't it correct that if the United States Supreme Court accepts that petition and permits California to file a complaint against the State of Texas, that irrespective of what this Court does with respect to the agreement you are asking this Court to approve, that the estate will not be liable anywhere near one hundred one or one hundred two per cent of taxation, if the United States Supreme Court takes that case?

A Subject to the other conditions of the agreement.

Q Let me rephrase the question: If the United States Supreme Court grants the petition by the State of

California to file a complaint against the State of Texas and at the same time, just irrespective of this agreement that you are asking this Court to approve, if the United States Supreme Court takes the case, absent this agreement isn't it correct that the estate will not be liable for in excess of one hundred per cent in taxation, because the Supreme Court will decide Texas or California or Nevada, or whatever, and that will remove the auger of double-taxation from the estate. Isn't that correct.

A The application with the Supreme Court by California has been filed pursuant to this agreement. You can't ignore this agreement.

Q Are you saying that the State of California filed its petition for leave to file a complaint based on this agreement?

A This agreement certainly affects California.

Q In other words, the estate is paying California two per cent to file a complaint in the United States Supreme Court. Is that correct?

A You can characterize it any way you wish. The agreement says what it says. The administrators of the estate have consented, by the agreement, to incur a maximum tax against the estate, of seventy-nine per cent, to avoid the specter of a tax of one hundred one per cent. It is just that simple.

Q Well, it may be that simple to you, but you are not making it very clear to me and I want to try it again.

If this agreement were not in existence and the United States supreme Court granted a petition for leave to file a complaint, which is pending before the United States Supreme Court, and the Court

grants that position, isn't it correct that the estate will not be subjected to double taxation?

A I'm not going to hypothesize or testify as to events that aren't, in fact, what we have before us.

Q Mr. Lummis, let me hand you what has previously been marked as State's Exhibit No. 1 in this proceeding. It's motion for leave to file a complaint by the State of California against the State of Texas in the United States Supreme Court.

Now, again, sir, if the Supreme Court grants that petition, isn't it correct that the estate will not be subject to bouble-taxation?

MR. DAVIS: Your Honor, I object to that as repetitious. That is not correct, because the Supreme Court might say Texas is not, and if we don't have this agreement we might end up paying California fourteen per cent when they try us out there.

MR. PLUYMEN: Your Honor, Mr. Davis is trying to coach the witness.

MR. DAVIS: Your Honor, that is what the agreement says and we are trying to speculate now what the law would be and what would happen.

THE COURT I can speculate on it as well as anybody. We can all deal in speculation. Let's get on with it.

Q (By Mr. Pluymen) Mr. Lummis, are you aware that the State of California filed an application for temporary restraining order and temporary injunction to enjoin this proceeding in the United States Supreme Court?

A Yes.

Q Are you aware of the United States Supreme Court's ruling?

A Yes.

Q You're aware of the ruling on that application by the State of California?

A Yes. It has denied that application.

Q What was your position, as an administrator and as a potential heir, in regard to the application for TRO and temporary injunction filed by the State of California in the United States Supreme Court?

A What was my position?

Q Yes, sir.

A I believe the action was brought by the State of California. I didn't have a position stated in that application.

Q Did you take any position in regard to the application for a temporary restraining order or a temporary injunction, whether in that application itself or whether ancillary thereto?

A I took a position that I had no objection to it and I had no objection to the Supreme Court acting affirmatively with respect to it.

MR. PLUYMEN: I have no further questions, Your Honor.

THE COURT: Mr. Roch?

CROSS EXAMINATION

QUESTIONS BY MR. ROCH:

Q Mr. Lummis, I believe it is correct, is it not, that my client, Mr. McIntyre and Rush Hughes, have not entered this agreement. Is that correct?

A That is my understanding.

Q I believe that you testified here that the requirement to become a party to this agreement has been waived by California.

A Yes, that is correct.

Q When was that done? When was that waiver done, Mr. Lummis?

A I don't know when the waiver was done. I was informed of it by Mr. Falk on Friday.

Q This last Friday?

A Yes.

Q Has it been done in writing? Because I haven't been informed of it. I didn't know anything about it. I hadn't heard of it.

MR. MILLER: I haven't received anything.

THE WITNESS: I have not seen it, but it's a matter of record in that proceeding in Nevada. I will so represent it to the Court. I have seen no writing about it, but Mr. Falk has told me that the State of California has waived the rejoinder of your clients.

Q I just notice the agreement itself apparently calls for it in writing, and I was wondering whether or

not he had written a letter and, if he had, if I would get a copy.

Just for the record, Mr. Lummis, I have never seen or heard of this agreement until this moment.

MR. ROCH: I have no further questions.

THE COURT: Ms. Brandt?

MS. BRANDT: Your Honor, we have no questions of this witness.

THE COURT: Mr. Davis?

MR. DAVIS: Thank you, sir. I would like to ask a few more, Your Honor.

REDIRECT EXAMINATION

QUESTIONS BY MR. DAVIS:

Q In regard to this letter agreement between counsel, Mr. Lummis, the first thing it says we will forward to California, at this stage to the State of California or their counsel, I should say, all pleadings and other documents filed in the Probate Courts.

Are these public records that California could obtain?

A Yes, they are.

Q Do you know why we agreed to furnish these to them and not put them to the expense of obtaining copies formally?

A I think the agreement was made so as to not needlessly inconvenience them and put them to needless expense obtaining matters to which they had easy access.

Q And it calls for all depositions taken in connection with the litigation.

Are you aware that they already had, at the time I first talked to them, nine depositions that had been taken in this case?

A I was aware that they had some depositions.

Q And one of those depositions was Mr. West's, and then I think a number of the so-called aids or assistants to Mr. Hughes, they had some of those depositions.

Do you know where they obtained those?

A I don't.

Q And all documents produced by any party thereto.

Were may of these documents already in California and subject to their discovery, if we had put them to the necessity of making formal discovery?

A It is my understanding that they were.

Q And we specifically indicate in this letter agreement between counsel that we are not going to tell them our theories of the law or our analysis of fact. Is that right, sir?

A That is correct.

Q And we don't do that as long as we are potential adversaries and they might sue us in the State Court in California. Isn't that correct, sir?

A That is correct.

Q Are we then just entering into an agreement to give

them informally what they could obtain formally and doing that because we feel they are bestowing some benefit on us by alleviating the necessity of our trying this case twice?

A Indeed.

Q Were you aware that Mr. Hill, in the course of the trial on domicile, asked me whether or not we would raise our agreement to California to pay them twenty per cent instead of eighteen per cent so that he might have a chance to get a part of that twenty per cent? Were you aware that he slid me a handwritten note to that effect?

GENERAL HILL: If Your Honor please, I guess just because I came into the courtroom again his mind starts clicking.

MR. DAVIS: I didn't even see him, Your Honor.

GENERAL HILL: Certainly, if Mr. Davis wants to go into all of the California business—

THE COURT: Well, it is not a part of redirect, Counsel. Sustain the objection.

Q So far as you know, has some information—let me ask this: As of the date of this agreement of November 10, 1977, had we, as counsel, forwarded certain information to California at that time, certain documents and things? Are you aware of that?

A That is my understanding, yes.

Q In this regard, we have never pled California as the domicile. Is that true? Is it true that we have never pled California as the domicile on the date of death, but we have indicated that we think he acquired

and adopted domicile in California one or more times in his lifetime?

A That is correct.

MR. DAVIS: All right. Thank you, sir. I will pass the witness.

GENERAL HILL: Mr. Lummis—

THE COURT: Just a minute, General. Mr. Dinkings?

MR. DINKINS: Your Honor, I have just one or two questions and I will try to be brief.

Q (By Mr. Dinkins) Mr. Lummis, you are aware, are you not, that one of the heirs on the maternal side is a minor and is, therefore, without the legal capacity to approve this or any other agreement? Is that correct?

A Yes, that is correct.

Q Do you know whether or not California has taken a position with respect to that minor?

A They have been made aware of that matter and have waived that joinder, as I understand the matter.

Q Referring to the letter dated November 10, 1977, which has been introduced in these proceedings—

THE COURT: It has not been introduced.

MR. PLUYMEN: It has just been marked.

MR. DINKINS: My correction, Your Honor.

Q (By Mr. Dinkins) Referring to that letter, it states in the course of our representation of the Nevada Co-Special Administrators in the Howard Hughes

estate, that "...we have amassed a significant amount of factual information and legal analysis which you have recognized may be of assistance to you in your suit against Texas in the United States Supreme Court," and it is signed by Mr. Ronald E. Gother, Mr. John W. Armogost and Mr. William T. Miller.

Are those parties signing that letter signing in their capacity as attorneys for the Nevada Co-Special Administrators?

A To some extent Mr. Miller is, yes.

Q But not Mr. Gother and Mr. Armogost?

A That is correct.

Q Is the significant amount of factual information and legal analysis referred to in the letter in substance the material that has been derived through discovery proceedings before this Court?

A I am sure a great deal of it has been. The material referred to is material that has been gathered by the attorneys, and I am not familiar with all of it and so I can't quantify what has been obtained where and in connection with what proceeding.

Q But at least a portion of it could well be material discovered in connection with proceedings here in Texas. Is that correct?

A Yes. I think a great deal of it was material that was obtained in attempting to respond to the discovery orders of this Court, at the request of Attorney General Hill.

MR. PLUYMEN: General Hill wants to ask him a few questions.

THE COURT: Ihave a rule of practice that says whatever lawyer begins with a witness in a contested proceeding, that lawyer remains with that witness.

RECROSS EXAMINATION

QUESTIONS BY MR. PLUYMEN:

Q Isn't it correct that the estate has agreed to pay the Court of California two per cent to file that suit in the United States Supreme Court?

A That question you put to me a few moments ago, and I believe I would like to have my answer to it read back to you.

Q Well, I wish you would answer that again because I don't believe you answered the question the last time.

A Well, let's have it read back and let me see if I did.

MR. PLUYMEN: Your Honor, I would ask the Court to—

THE COURT: You would what?

MR. PLUYMEN: I would ask the Court to instruct the witness to answer the question.

THE COURT: I think he has answered it. I am well aware of his position from his testimony.

MR. PLUYMEN: No further questions, Your Honor.

THE COURT: Is there anything further from this witness?

Mr. Roch? Ms. Brandt?

The witness may step down.

Call your next witness.

MR. DAVIS: Call Mr. Pluymen.

Is it all right for Mr. Lummis to be excused, Your Honor?

THE COURT: Any objection?

GENERAL HILL: Yes, we object. I have not had a chance to talk with Mr. Pluymen, and I would like that opportunity. Certainly I don't make my statement to just simply unnecessarily take his time, but I assume that we will have an opportunity to put on a case, perhaps, and, if do, then I want at least to discuss it with Mr. Pluymen as to whether we want to call Mr. Lummis. If you can give me five or ten minutes after we adjourn, then I can let Mr. Davis know whether we can release him or not.

MR. DAVIS: This is fine.

THE COURT: Proceed.

APPENDIX E

AGREEMENT PROVISIONALLY COMPROMISING DEATH TAX CLAIM OF THE STATE OF CALIFORNIA

THIS AGREEMENT is made as of November 10, 1977, between Kenneth Cory, Controller of the State of California (hereinafter "California"); the undersigned Administrators of the Estate of Howard R. Hughes, Jr. ("the Estate") in the States of California, Texas, Nevada, Louisiana and Delaware (hereafter "the Administrators"); Annette Gano Lummis, individually and in the capacity of Designating Authority under that certain agreement, entitled "Settlement Agreement", the Ancillary Agreement thereto, and all amendments thereto, between certain of the intestate heirs of Howard R. Hughes, Jr.; and the undersigned individuals who are or claim to be the intestate heirs of Howard R. Hughes, Jr. (hereinafter "the Heirs"). The Agreement is made with reference to the following agreed facts:

A. Howard R. Hughes, Jr. (hereinafter "Decedent") died on April 5, 1976. Administration of the Estate has been commenced in Texas, Nevada, California, Louisiana and Delaware and one or more of the Administrators have been appointed as administrators in each of those jurisdictions. The parties believe that Decedent died intestate, although contrary claims have been asserted which have yet to be adjudicated.

B. Because of the unique manner in which Decedent lived and conducted his business and personal affairs, the ambiguity of the domicile concept, and for other reasons as well, there is substantial uncertainty as to the correct state of his domicile for purposes of death taxation. The State of Texas claims that Decedent was a domiciliary and accordingly seeks to levy death taxes at

the rate of nearly 16%. California claims that Decedent was a domiciliary and accordingly seeks to levy death taxes at graduated rates up to 24%, this highest rate being applicable for all assets in excess of $400,000. California further contends that if Decedent was a domiciliary of a jurisdiction outside the United States, certain substantial death taxes would be owed to it because of the situs for inheritance tax purposes of certain substantial assets in California. The Administrators and most of the Heirs contend that Decedent was a domiciliary of the State of Nevada, which imposes no death taxes, and all of the Heirs contend that only a limited amount of assets have their situs in California for inheritance tax purposes. The facts are sufficiently complex and uncertain that the contentions of California and the Administrators and the Heirs are substantial and are asserted in good faith. Absent agreement of the parties, the dispute as to domicile between California and the Administrators and Heirs would have to be the subject of costly and prolonged litigation in the courts of California, the outcome of which is by no means certain.

C. The death tax claim of the State of Texas, based on its assertion of a Texas domicile, presents a threat to the ability of California to collect the death taxes claimed by it because the assets of the Estate are insufficient to satisfy the aggregate tax claims of the United States, California and Texas. California has elected to invoke the original jurisdiction of the Supreme Court of the United States under the authority of *Texas* v. *Florida*, 306 U.S. 398 (1938) to obtain a determination that Texas is not the state of domicile for purposes of death taxation. If the Supreme Court should accept jurisdiction and determine whether or not Texas is entitled to impose a death tax based on domicile, the Heirs and Administrators will be willing to compromise the death tax claim of California on the basis hereafter

set forth.

D. Despite the objections of the Heirs, California has required, as a condition of entering into this Agreement, that the Heirs become parties hereto to assure to it the enforceability of this Agreement.

THE PARTIES AGREE AS FOLLOWS:

1. The following agreement is made upon the condition that the Supreme Court accepts jurisdiction of California's action described above and actually renders a judgment which adjudicates the issue of whether Decedent was or was not a Texas domiciliary on the date of his death. If that condition is not and cannot be fulfilled, this Agreement shall be of no force and effect and, *inter alia*, California will be free to assert, and the Administrators and Heirs will be free to resist, its tax claims based on the maximum rate of 24% and its contentions as to the domicile of the Decedent.

2. Subject to the conditions herein set forth, and provided that the Supreme Court renders a judgment which determines that Texas was not the state of Decedent's domicile on the date of his death, the Administrators, on behalf of the Estate, and the Heirs, agree that from the assets of the Estate, there shall be paid to California, in full settlement and compromise of its death tax claim, an amount equal to eighteen percent (18%) of the net taxable estate as defined in Section 2051 of the Internal Revenue Code and as finally determined in accordance with the Internal Revenue Code for federal estate tax purposes, less the sum of all death taxes imposed by states other than California with respect to real property (including fixtures) located outside of California. Said tax may be payable in installments and shall bear interest as hereinafter provided. California agrees to accept the payments

provided for in this paragraph 2 and in paragraph 3 below in satisfaction of any and all claims on behalf of California for inheritance, estate and any other form of death taxes (including interest and penalties) due from the Estate and all beneficiaries thereof when actually received by it free of escrow.

3. The tax payable hereunder, at the option of the Administrators, may be paid in installments and if so paid shall be paid on or before the payment of each installment (including deficiencies) of the Federal Estate Tax against which the installment of the tax payable hereunder is to be claimed as a credit, and shall bear interest from January 5, 1977, to the date of payment at the rate or rates applicable to each such installment of the federal estate tax under Section 6621 of the Code. Accrued interest shall be paid at the time of each of said installments. Until the conditions set forth in paragraphs 1, 8 and 9 have been satisfied or waived and the expiration of the last applicable period of limitations specified in subsection (c) of Section 2011 of said Code, the Administrators shall have the further option to pay any installment of the tax payable hereunder, together with accrued interest, to Security Pacific National Bank ("escrow agent") or such other national or state banking association with its principal office in the State of California as California and the Administrators may agree. An escrow agreement shall be entered into between California and the Administrators, and shall not be for the benefit of any person, entity or state not a party to this Agreement. All amounts held subject to such escrow agreement (hereinafter referred to as "the Fund") shall be invested solely in U.S. Treasury notes, bills and bonds, as California shall direct. In the event that the installment(s) of taxes and interest actually paid hereunder shall be less or more than that payable from

time to time because of a final determination recomputing the net taxable estate as heretofore reported, the deficiency shall forthwith be paid over to the Fund in accordance with paragraph 2 or the excess (plus the interest attributable thereto) shall be refunded by the escrow holder (or by California, if the Fund has been paid over to it) to the Administrators (in accordance with their respective contributions to the Fund) as the circumstances may require. Notwithstanding the foregoing, the Administrators shall have the right to direct the escrow holder to pay all or any part of the Fund to California.

4. The liability of the Administrators for the payment of taxes or interest as provided herein shall be limited to that imposed upon them in their representative capacity. The personal liability of each Heir for such taxes and interest shall be limited to the value of assets distributed to such Heir from the Estate as of the date or dates of distribution. The taxes and interest payable hereunder shall be paid from assets of the Estate by the Administrators in the manner provided by law.

5. At such time as no reasonable prospect exists that the conditions set forth in paragraphs 1, 8 and 9 hereof can be satisfied, the Fund and all interest accrued therein shall be paid over to the Administrators in proportion to their respective contributions to the Fund. In the event that the Supreme Court shall determine that Texas was the state of domicile, there shall be paid from the Fund to the Administrators in the abovementioned proportions an amount equal to the lesser of (i) the tax claim of the State of Texas, as finally determined, including all amounts of interest and penalties thereon ("the Texas tax") or (ii) the amounts in the Fund. Upon such payment to the Administrators, all amounts (a) remaining in the Fund, and (b) which under

paragraphs 2 and 3 hereof would be payable to the Fund but for the finding of Texas domicile by the Supreme Court less the amounts paid or payable to Texas in satisfaction of the Texas tax, if any, shall be paid over to the State of California in full settlement and compromise of all death tax claims which could be asserted by it even if Decedent were not a domiciliary of California. At such time as the conditions set forth in paragraphs 1, 2, 8 and 9 have been satisfied and there has either been a final determination in each of the Probate Courts (as defined in paragraph 8(b)) that Decedent died intestate, or a final determination of the net taxable estate, whichever first occurs, the escrow shall terminate and the assets of the Fund shall be paid over to California.

6. Notwithstanding that a condition of this Agreement is a determination by the Supreme Court on the question of whether Texas is the state of domicile as set forth in paragraph 2 above, said condition shall be deemed waived in the event that Texas and California agree upon a division of the amounts payable pursuant to paragraph 2 in full settlement of their respective death tax claims, including a full release of the Estate and the Heirs with respect thereto.

7. The Administrators and the Heirs agree not to contest the claim of California in the Supreme Court proceeding referred to above that Decedent did not die domiciled in the State of Texas.

8. This Agreement is subject to the following conditions, the first of which may be waived by California, in its sole discretion, but only by a writing addressed to the Administrators and the Heirs:

(a) Execution of this Agreement by all of the Heirs, whose names are stated in paragraph 21(d)-(g) below, on or before November 30, 1977.

(b) Approval of this Agreement and the payment of all taxes due and payable hereunder by the Superior Court of the State of California, County of Los Angeles, the Eighth Judicial District Court of Clark County, Nevada, and Probate Court No. 2, Harris County, Texas ("the Probate Courts").

The Administrators and the Heirs who have executed this Agreement shall use their best efforts to satisfy the above conditions and the condition set forth in paragraph 9 below.

9. This Agreement is subject to the condition, which may be waived by the Administrators, in their sole discretion, by a writing addressed to California, that the Administrators obtain a ruling from or, at the option of the Administrators, enter into a closing agreement with the Internal Revenue Service that the amounts payable hereunder qualify (subject to the limits provided by the Internal Revenue Code) for the credit specified in Section 2011 of the Code.

10. The Administrators and the Heirs agree that as a consequence of the provisional death tax liability to California hereunder, California has a substantial interest in a fair and accurate determination of the value of the net taxable estate. They agree that, subject to the concurrence of the Internal Revenue Service, California may participate in all administrative and judicial proceedings, formal and informal, which the Internal Revenue Service and/or the courts having jurisdiction will undertake or conduct in order to audit the estate tax return, value the assets, and determine the net taxable estate. It is understood that the Administrators intend, and shall have right, to vigorously defend the net taxable estate as reported in the estate tax return heretofore filed. The Administrators and the Heirs will provide to California copies of all documents filed with or received

from the Internal Revenue Service in relation to such matters and will furnish California with as much prior notice as is reasonably possible of all hearings, meetings, conferences, or other events at which representatives of the Estate or the Internal Revenue Service will be present. The Administrators and Heirs hereby waive such rights as they possess under the Federal Privacy Act or any other law to the extent that such waiver is necessary or appropriate to permit the Internal Revenue Service to fully share with California all information concerning the Estate.

11. This Agreement is not intended by the Administrators to reflect the recognition of any particular jurisdiction as the domicile of the Decedent for purposes of administration of Decedent's estate, but is entered into solely for the purpose of resolving a disputed tax claim. No representation or assertion, either express or implied, concerning the domicile of the Decedent as of the date of his death, shall be attributable to any Heir as a consequence of this Agreement.

12. The execution of this Agreement by each of the Administrators shall be of no force and effect unless specifically approved by the Probate Court having jurisdiction.

13. This Agreement shall be interpreted and enforced in accordance with the laws of the State of California.

14. The Heirs agree that they will be amenable to suit in the Superior Court of the State of California, and hereby consent to its jurisdiction, in the event and only in the event that suit is brought by California to enforce any provision of this Agreement.

15. This Agreement may not be modified except by a writing executed by the parties hereto. All parties hereto acknowledge for the benefit of California that Annette

Gano Lummis as Designating Authority, or her successor Designating Authority, has the power to act on behalf of the Heirs in relation to any such modifications and in execution of the provisions of paragraph 16 hereof.

16. The parties hereto agree to execute any documents and take any and all actions necessary or desirable to effectuate the purposes of this Agreement and to obtain all necessary consents and approvals incident thereto.

17. The Administrators and the Heirs stipulate and agree that, at such time as the amount of tax payable to California in accordance with this Agreement is capable of being ascertained, the Superior Court of the State of California, County of Los Angeles, shall enter an Order fixing and assessing the tax in accordance with this Agreement. Said Order shall be binding on all parties hereto.

18. All of the terms, provisions and obligations of this Agreement shall be binding upon and inure to the benefit of the parties hereto, and their respective heirs, representatives, successors and assigns.

19. In the event this Agreement shall not for any reason become effective as contemplated herein, no provision hereof shall constitute any admission against interest as related to any contest of the purported wills of Decedent, or any proceeding in which the domicile of Decedent is an issue or for any other purpose whatsoever, and shall not be admissible in evidence for any purpose in any proceeding in law or in equity.

20. This Agreement may be executed in counterparts. To facilitate execution, the original executed agreement with all signatures assembled thereon shall be deposited with counsel for California and held by him for the benefit of all parties. Counsel for California will provide the

parties with a conformed copy, the authenticity of which shall be certified by him, and the parties hereto stipulate that such conformed and certified copies shall for all purposes be deemed to be authentic as if the original signature copy.

21. All notices, demands, deliveries and other communications hereunder shall be in writing and shall be deemed to have been duly given or made, as the case may be, when delivered or when mailed by United States registered or certified mail, postage prepaid, addressed to the parties at the following addresses of counsel for the respective parties (or such other addresses as may be designated by written notice given in the manner aforesaid):

(a) To the Controller of the State of California:

Jerome B. Falk,Jr.,
Howard, Prim, Rice, Nemerovski, Canady & Pollak
A Professional Corporation
650 California Street, Suite 2900
San Francisco, California 94108

(b) To Richard C. Gano, Jr., Special Administrator:

Ronald E. Gother
Gibson, Dunn & Crutcher
515 South Flower Street
Los Angeles, California 90071

(c) To William R. Lummis, Co-Special Administrator in Nevada, Temporary Co-Administrator in Texas, and Ancillary Administrator in Delaware, and Provisional Administrator in Louisiana; to First

National Bank of Nevada, Co-Special Administrator in Nevada; and to Annette Gano Lummis, Temporary Co-Administratrix in Texas:

William T. Miller
Andrews, Kurth, Campbell & Jones
Suite 2500 Exxon Building
Houston, Texas 77002

(d) To William Kent Gano, Richard C. Gano, Jr., Doris Gano Wallace, Annette Gano Gragg, Howard Hughes Gano, Annette Gano Lummis, Allene Lummis Russell, Annette Gano Lummis Neff, William Rice Lummis, Frederick Rice Lummis, Jr., Janet Houston Davis, Sara Houston Lindsey and Southern National Bank of Houston, Independent Executor of the Estate of James Patrick Houston, Jr., Deceased:

Morse, Foley and Wadsworth
Suite 700 First National Bank Building
302 East Carson Avenue
Las Vegas, Nevada 89101

(e) Richard Alexander Houston (by his Guardian, Marian Fleming Houston Comstock):

O. Theodore Dinkins, Jr.
Butler, Binion, Rice, Cook & Knapp
1100 Esperson Building
Houston, Texas 77002

(f) Barbara Cameron, Elspeth DePould and Agnes Roberts:

John W. Armagost
Kindel & Anderson
555 South Flower Street
Los Angeles, California 90071

(g) To Avis Hughes McIntyre and Rush Hughes:

Robert H. Roch
Fisher, Roch & Gallagher
2600 Two Houston Center
Houston, Texas 77002

22. The parties to this Agreement have been advised by their respective counsel, whose names appear in paragraph 21 above, in connection with the negotiation and execution of this Agreement.

S/S (by Jerome B. Falk, Jr.)

Kenneth Cory, Controller of the
State of California

THE ADMINISTRATORS:

William R. Lummis, Co-Special Administrator in Nevada, Temporary Co-Administrator in Texas, Ancillary Administrator in Delaware, Provisional Administrator in Louisiana

First National Bank of Nevada, Co-Special Administrator in Nevada

Annette Gano Lummis, Temporary Co-Administratrix in Texas

Richard C. Gano, Jr.,
Special Administration in
California

THE HEIRS:

Annette Gano Lummis,
in her capacity as
Designating Authority

William Kent Gano

Richard C. Gano, Jr.

Doris Gano Wallace

Annette Gano Gragg

Howard Hughes Gano

Annette Gano Lummis

Allene Lummis Russell

E-14

Annette Gano Lummis Neff

William Rice Lummis

Frederick Rice Lummis, Jr.

Janet Houston Davis

Sara Houston Lindsey

Southern National Bank of Houston,
Independent Executor of the
Estate of James Patrick Houston,
Jr., Deceased

Richard Alexander Houston,
by his Guardian, Marian
Fleming Houston Comstock

Barbara Cameron

Elspeth DePould

Agnes Roberts

E-15

Avis Hughes McIntyre

Rush Hughes

APPENDIX F

GIBSON, DUNN & CRUTCHER

LAWYERS

515 SOUTH FLOWER STREET

LOS ANGELES, CALIFORNIA 90071

—

(213) 488-7000

TELEX: 67-4930

CABLE ADDRESS: GIBTRASK

November 10, 1977

WRITER'S DIRECT DIAL NUMBER
(213) 488-7322

Mr. Jerome B. Falk, Jr.
Howard, Prim, Rice, Nemerovski,
Canady & Pollak
650 California Street, Suite 2900
San Francisco, California 94108

Re: *Hughes Estate*

Dear Jerry:

In the course of our representation of the Nevada Co-Special Administrators of the Estate of Howard Hughes ("Nevada Administration"), we have amassed a significant amount of factual information and legal analysis which you have recognized may be of assistance to you in your suit against Texas in the United States Supreme Court. With our client's consent, based on your insistence that the following is fundamental to achievement of the purpose of the Provisional Agreement (the "Agreement") we are prepared to

furnish you with the following information, under the terms and conditions set forth herein:

We, as counsel for the Nevada Administration, will immediately cause to be prepared, and delivered to you as promptly as possible, copies of all of the following documents under our control in which our client has an interest or which are public information: (a) all pleadings and other documents filed in the Probate Courts (including correspondence with said Courts); (b) all depositions taken in connection with the litigation pending in the Probate Courts relating to the Estate; and (c) all documents produced by any party thereto relevant to the issue of domicile.

The materials furnished you pursuant to the preceding paragraph shall be accompanied by such indices of the public documents as we have prepared so as to enable you to organize and assimilate these materials in the minimum possible time.

Until the Supreme Court grants California's motion for leave to file its complaint against Texas, we remain potential adversaries in the California courts. Until the Court accepts jurisdiction, we will not be able to share with you the legal contentions and factual analyses supporting our position that Hughes dies domiciled in Nevada. We will, however, make available to you for inspection the materials we have prepared supporting the claim that Hughes acquired a California domicile upon leaving Texas.

Once the Court accepts jurisdiction of California's complaint, we will share with you all factual and legal analyses which we have prepared regarding our claim that Hughes was a Nevada domiciliary, including deposition summaries, legal memoranda and written analyses of any legal or factual issues bearing on the

domicile question. These materials will be made available to you for inspection, but copying of these documents will not be permitted. In addition, attorneys from our offices will be available for consultation with you, should you desire, in aid of your litigation against the State of Texas.

None of the information made available to you hereunder shall be used for any purpose other than the assertion and collection of the payment of tax to California hereunder.

It is our understanding that in the event that the Supreme Court accepts jurisdiction of the proceedings, it is your present intention not to resist the motion of the Nevada Co-Special Administrators to become a party to such proceeding, on the condition that such Co-Special Administrators align themselves with you and take no position inconsistent with that of the State of California in the matter, but it is understood that you will make that determination at the time that such a motion is made in the best interests of your client and that a major consideration of said determination will be the effect thereof on the court's retaining jurisdiction of the proceeding.

We have discussed the possibility that one or more of the Probate Courts may refuse to approve the Agreement so long as taxes in excess of the maximum federal tax credit allowed by Section 2011 of the Internal Revenue Code are required to be paid by the Estate. In this event, we will use our best efforts to obtain the agreement of the Administrators and the Heirs to a modification of the Agreement reducing the tax paid by the Estate pursuant to paragraphs 2 and 3 of the Agreement to the maximum allowable tax credit, and providing that the balance will be paid by the Heirs when and as sufficient funds are distributed by the

Estate to them. In the event of such modification the condition set forth in paragraph 8(b) of the Agreement shall be waivable solely by the Administrators.

Very truly yours,

S/S
Ronald E. Gother

S/S
John W. Armagost

S/S
William T. Miller

FEB 17 PAGE 10

Supreme Court, U. S.
FILED
FEB 6 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76, Original

STATE OF CALIFORNIA
Plaintiff,

v.

STATE OF TEXAS
Defendant.

Reply to Brief in Opposition to Motion for Leave to File Complaint

MYRON SIEDORF
Chief Inheritance Tax Attorney
JAMES R. BIRNBERG
Assistant Inheritance Tax Attorney
107 South Broadway
Los Angeles, California 90012

JEROME B. FALK, JR.
STEVEN L. MAYER
HOWARD, PRIM, RICE, NEMEROVSKI,
CANADY & POLLAK
A Professional Corporation
650 California Street, Suite 2900
San Francisco, California 94108
Telephone: (415) 434-1600
Attorneys for Plaintiff

BORG PRINTING COMPANY OF CALIFORNIA, 348 FIRST STREET, SAN FRANCISCO 94105

INDEX

Page

Preliminary Statement 1

I. Jurisdiction in This Case Is Properly Founded Upon *Texas v. Florida*, 306 U.S. 398 (1938)..... 2

A. A Case or Controversy Plainly Exists Between California and Texas Because There Exists a Substantial Risk of Conflicting Adjudications of Domicile and the Imposition of Inconsistent Taxes in Excess of the Assets of the Estate..... 2

B. *Texas v. Florida* Represents a Classic Exercise of This Court's Power to Decide Jurisdictional Disputes Between States and Should Not Be Overruled..... 12

C. The Abstention Doctrine Is Inapplicable to This Case Because There Is No Alternative Forum Where California's Claims May Be Determined 17

II. California Is a Real Party in Interest Which Seeks Relief for Its Own Benefit and Thus Has Standing to Invoke This Court's Original Jurisdiction 20

TABLE OF AUTHORITIES CITED

Cases	Pages
Bordenkircher v. Hayes, ... U.S. ....., 46 U.S.L.W. 4089 (1978)	24
Cohn v. Cohn, 20 Cal.2d 65 (1942)	10
Connally v. Georgia, 429 U.S. 245 (1977)	5
Curry v. McCanless, 307 U.S. 357 (1939)	14
De Miglio v. Paez, 189 N.Y.S.2d 593, 18 Misc.2d 914 (1959)	18
Estate of Buckhantz, 120 Cal.App.2d 92 (1953)	10
Estate of Setrakian, 169 Cal.App.2d 795 (1959)	10
Friedberg v. Santa Cruz, 86 N.Y.S.2d 369, 274 App. Div. 1072 (1949)	18
Graves v. Elliott, 305 U.S. 667 (1938)	14
Kansas v. U.S., 204 U.S. 331 (1907)	22
New Hampshire v. Louisiana, 108 U.S. 76 (1883)	22
Norton v. Jones, 210 S.W.2d 820 (Tex.Civ.App. 1948)	10
Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971)	18
Oklahoma ex rel. Johnson v. Cook, 304 U.S. 387 (1938)	22
Pennsylvania v. New York, 407 U.S. 206 (1972)	16
Riley v. N.Y. Trust Co., 315 U.S. 343 (1942)	11
Shaffer v. Heitner, ... U.S. ....., 53 L.Ed.2d 683 (1977)	19
South Dakota v. North Carolina, 192 U.S. 286 (1904)	22, 27
State Farm Fire and Casualty Co. v. Tashire, 386 U.S. 523 (1967)	3

	Pages
State Tax Commissioner v. Aldrich, 316 U.S. 174 (1942)	14
Texas v. New Jersey, 379 U.S. 674 (1965)	13
Texas v. Florida, 306 U.S. 398 (1938)	*passim*
Tumey v. Ohio, 273 U.S. 510 (1927)	5
Ward v. City of Monroeville, 409 U.S. 57 (1972)	5
Western Union v. Pennsylvania, 368 U.S. 71 (1961)	15, 16
Zablocki v. Redhail, ... U.S. ....., 46 U.S.L.W. 4093, 4096 n.9 (1978)	21

Statutes

8 DEL. C. § 169	13
31 U.S.C. § 191	10, 11
18 Calif. Admin. Code § 13983(d)	8
18 Calif. Admin. Code § 13988(g)	7, 8
Calif. Probate Code § 901	7
Calif. Probate Code § 910	7
Calif. Probate Code § 970	10
Calif. Rev. Tax. Code § 13404	10
Calif. Rev. Tax. Code § 13405	10
Calif. Rev. Tax. Code § 13406	10
Calif. Rev. Tax. Code § 13988	7
Calif. Rev. Tax. Code § 14101b	16
Calif. Rev. Tax. Code § 14121	10
Calif. Rev. Tax. Code § 14191	23
Calif. Rev. Tax. Code §§ 14199-14199.13	17
Calif. Rev. Tax. Code § 14301	10
Calif. Rev. Tax. Code § 14322	16
Tex. Tax-Gen.Ann. Art. 14.015(2)	10
Tex. Tax-Gen.Ann. Art. 14.13	23
Tex. Tax-Gen.Ann. Art. 14.18(c) (Vernon)	16

OTHER AUTHORITIES

CCH Inheritance, Estate and Gift Tax Reporter ¶ 2030B 16
CCH Inheritance, Estate and Gift Tax Reporter ¶ 12,035 23
Lewis, The Day They Shook The Plum Tree (1963) 14

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76, Original

STATE OF CALIFORNIA
Plaintiff,
v.
STATE OF TEXAS
Defendant.

Reply to Brief in Opposition to Motion for Leave to File Complaint

PRELIMINARY STATEMENT

The Brief in Opposition filed by Texas contains a great deal of irrelevant material. We shall not respond to the incomplete and one-sided description of decedent's life presented in Texas' Statement of Facts. Tex. Br., at 2-6. California alleges in its proposed Complaint that both California and Texas were prosecuting their domicile-based death tax claims in good faith (Complaint ¶ 2) and we do not understand Texas to contend otherwise. Discussion of the merits of the domicile dispute is thus premature.

Rather, in this response we shall deal, first, with the attempt by Texas to distinguish—or advocate the overruling of—*Texas v. Florida,* 306 U.S. 398 (1938). See Part I, *infra.* Then, in Part II, *infra,* we shall discuss the Pro-

visional Settlement Agreement between California and the estate which Texas unjustifiably contends disentitles California from proceeding in this Court.

I.

JURISDICTION IN THIS CASE IS PROPERLY FOUNDED UPON TEXAS V. FLORIDA, 306 U.S. 398 (1938).

A. A Case or Controversy Plainly Exists Between California and Texas Because There Exists A Substantial Risk of Conflicting Adjudications of Domicile and the Imposition of Inconsistent Taxes in Excess of the Assets of the Estate.

The proposed Complaint alleges that Texas and California each seek to levy a domicile-based inheritance tax on the estate of Howard Hughes and that if both states do so the applicable tax rates, combined with the federal rate, will exceed 100%. These allegations, which are based entirely on facts which have already been established as a matter of public record, are sufficient to establish jurisdiction under *Texas v. Florida*, 306 U.S. 398 (1938). Simple arithmetic demonstrates that California's ability to collect its full, lawfully-imposed tax is gravely threatened by Texas.

Against these facts, Texas advances only speculation that this event or that might substantially diminish the likelihood that the estate will be unable to satisfy the tax claims of both California and Texas. Such speculation provides no basis for a refusal to entertain this suit. For reasons discussed in detail herein, the contingencies advanced by Texas, taken either separately or together, are an insufficient basis upon which to leave California unprotected against the irreparable injury which Texas threatens to its public purse. But even if we are wrong, and future events render it more likely that the estate will retain sufficient funds to satisfy the tax claims of both California and Texas, that determination may best be made in an atmos-

phere illuminated by actual circumstance rather than pure speculation. Assessment of the precise degree of likelihood that California will suffer irreparable injury at the hands of Texas should be made in the first instance by a Special Master on the basis of detailed factual showings by each party; a motion for leave to file is an inappropriate point for Texas to attempt to controvert, and this Court ultimately to assess, the jurisdictional allegations of California's complaint.

At this juncture, *Texas v. Florida* requires only a showing that "conflicting claims are asserted and that the consequent risk of loss is substantial." *Id.*, at 406. It is inherent in the nature of the equity jurisdiction recognized in that case that its invocation does not and cannot require a demonstration to a near-certainty that these inconsistent tax claims will exceed the assets of the estate. Although it may not be possible to calculate with the nice certainties of a statistician the exact probability that California will be unable fully to enforce a tax judgment, an examination of the various speculative contingencies proposed by Texas could hardly permit a confident judgment that California's fears are groundless. Jurisdiction under *Texas v. Florida* is not defeated by the possibility of a *deus ex machina*. The purpose of the interpleader jurisdiction established in that case is to "avoid[] . . . the *risk* of loss resulting from the *threatened* prosecution of multiple claims." *Id.*, at 410 (emphasis added). The invocation of the jurisdiction cannot be stayed until the feared loss becomes a reality or until the competing claims are reduced to judgment (*State Farm Fire and Casualty Co. v. Tashire*, 386 U.S. 523, 531-33 (1967)), since to await those contingencies would force the stakeholder to suffer the risks and expenses of multiple adjudications where only one claim can, under any circum-

stances, be valid and would expose the other claimants to the danger of losing the "race to judgment." *Id.*, at 533.

Thus *Texas v. Florida* specifically holds that "a plaintiff need not await actual institution of independent suits" to invoke the jurisdiction (*id.*, at 406); *a fortiori*, invocation of the jurisdiction need not await a final determination of the value of the estate, the resolution of the will controversies or the reduction of the compelling tax claims to final judgment. *Texas v. Florida* requires only that the circumstances "as they are in good faith alleged and shown to exist at the time the suit was brought" establish that the "risk of loss is real and substantial." *Id.*, at 407, 410. That is what California has done here.

All the factors which the Court in *Texas v. Florida* thought sufficient to assess the risk of estate depletion as "real" and "substantial" are present in this case. The "jurisdictional peculiarities of our dual federal and state judicial systems" (*id.*, at 410), which permit competing states to secure inconsistent death tax judgments, have not changed since 1938. As in *Texas v. Florida*, the decedent's relationship with both California and Texas was such "as to afford substantial basis for the claim that he was domiciled within it, with *fair probability* that the claim would be accepted and favorably acted upon." *Id.*, at 411 (emphasis added). Similarly, in this case, "the facts most essential to establish that attitude and relationship of person to place which constitute domicile [are] obscured by numerous self-serving statements of decedent as to his domicile which, because made for the purpose of avoiding liability for state . . . taxes levied on the basis of domicile, tend[] to conceal rather than reveal the true relationship in this case." *Id.*, at 411.[1]

1. *See, e.g.*, Tex. Br., at 2-6.

Moreover, there are additional factors here, not present in *Texas v. Florida*, which enhance the likelihood that the tax claims will exceed the available assets of the estate. The magnitude of the estate is so great and the tax rates sufficiently high that jurors passing on a domicile claim may perceive a direct financial stake in the outcome, thus increasing the likelihood of a decision favorable to the taxing state. *Cf. Tumey v. Ohio*, 273 U.S. 510 (1927); *Ward v. City of Monroeville*, 409 U.S. 57 (1972); *Connally v. Georgia*, 429 U.S. 245 (1977). Moreover, quite unlike the situation in *Texas v. Florida*, the responsible taxing officials of both contending states have already taken concrete action to enforce their asserted tax claims. *Compare Texas v. Florida, supra* at 402, n. 5. And, as pointed out in our moving papers (Memorandum, at 15), in *Texas v. Florida* the assets would have been insufficient only in the statistically unlikely event that each of *four* separate states found decedent to be its own domiciliary and levied a death tax; here, that result will occur in the far more probable event that only *two* states—California and Texas—do so.

Texas offers an elaborate hypothetical (Tex. Br., at 14 n. 6) based upon the possibility that the different jurisdictions may appraise the estate at somewhat different valuations. The most obvious flaw in Texas' analysis is that it assumes that the discrepancies will result in tax valuations at *less* than actual value; it is, however, equally likely that variations will result in over-valuation, which would only exacerbate the problem.[2] In any event, with presumably

2. Indeed, whatever bias each taxing agency brings to bear on the valuation question would presumably push toward over-valuation, since the greater the valuation, the more tax collected. While we have no reason to think that any agency is biased in any direction, there is certainly no reason to believe that any of the three taxing jurisdictions involved in this case would significantly undervalue the estate.

reasonable persons evaluating the same assets according to the same criteria, there is no reason to believe that the resulting valuations will vary so widely as to alleviate the inability of the estate to pay the cumulative tax bill.[3]

Texas speculates that in future years the estate—as a consequence of its ownership of the stock of Summa Corporation—may generate sufficient funds to pay the assessed taxes on an installment basis. Tex. Br., at 15. But, while not a static entity, Summa Corporation is not an income producing one. Indeed, an affidavit filed by Milton West, Jr., a member of the Summa board of directors and counsel for the Hughes estate (the relevant portion of which is attached hereto as Appendix "A"), states that Summa had an operating loss in each of the five years ending in 1975 and the first nine months of 1976 with a cumulative total of over $131 million. Although current figures are not publicly available, the California Inheritance Tax Division has been advised by a representative of the estate that in 1976 Summa sustained a net operating loss of more than $29 million and a reduction of net book value of more than $169 million (the latter figure reflecting substantial write-downs of assets and a reserve of $87 million for litigation). The Division has been further advised that, although final figures for 1977 are not yet available, there will again be a substantial net operating loss of more than $15 million. The estate, therefore, appears to be a

3. Additionally, because the federal tax rate is substantially higher than that of the states, any potential difference in valuation could have a significant effect on the total taxes due only if the federal valuation were significantly lower than that of both the states—as, not coincidentally, it is in Texas' hypothetical. Moreover, any potential difference in valuation would be offset by the far more stringent limits which California places on deductions. See note 5, *infra*.

shrinking asset rather than a growing one. At the same time, the payment of tax under the deferral provisions necessarily increases the amount of interest due which, in California, accrues at 12% per annum.[4] For Texas to be correct in viewing Summa's dubious income generating potential as the solution to the problem, the estate would have to generate income (net of income taxes) in *excess* of the accruing interest on unpaid death taxes; thus far, it appears to have fallen far short, and with every passing day the accrued interest increases the shortfall.

It should also be noted that a number of expenses and liabilities which may be deducted for purposes of determining federal estate taxes are not allowed for California inheritance tax purposes. The Complaint therefore alleges (in Appendix "A") that the estate had claimed deductions for federal estate tax purposes of $115,034,274 but that only $47,906,072 of that amount would be deductible for California inheritance tax purposes.[5] Thus, the combined taxes (even without regard to accrued interest) are substantially more than 101% of available assets and the short-

4. In addition, since California's interest rate of 12% is substantially greater than that of Texas (6%) or the federal government (a variable rate which is presently 6%), the proportionate share of taxes going to California will increase over time, thus further increasing the likelihood that California will be unable to collect the amounts properly due it.

5. The explanation for the difference in allowable deductions rests primarily on the fact that California imposes severe limits on the deductibility of costs of administration and fees for attorneys, executors and administrators. While such expenses are deductible for federal estate tax purposes if they were authorized under state law and, in the case of attorney's and executor's fees, approved by the probate court, California limits deductibility to a small percentage of the estate's value for attorney's and executor's fees and permits deduction only of the *ordinary* costs of administration. *Compare* 26 U.S.C. § 2053 with CALIF. REV. & TAX CODE § 13988, CALIF. PROBATE CODE § 901, 910 and 18 CALIF. ADMIN. CODE § 13988(g)(10). Thus while the estate claimed a deduction on its

fall is not merely one percent. For example, based upon the values reported by the estate and the calculations set forth in Appendix "A" to the Complaint, the total taxes and interest through 11/6/77 would be $72,609,296, against available assets of approximately $51 million. Complaint ¶¶ 12-13. Thus, the taxes would be not 101% of the available estate but roughly 142%; the shortfall would be approximately $21 million, which is roughly two-thirds of the $32 million of tax due to California. See Complaint ¶ 12. For these reasons, neither the possibility of inconsistent valuations nor the availability of an extended payment period materially diminishes the probability that the estate will be subjected to liability greater than it is able to bear.

There is also the question of the pendency of the "Mormon will" and "lost will" claims. We know of no way by which this Court can make an independent analysis of the probability that either of these rather bizarre and unlikely will claims may prevail, thus reducing the potential tax liability of the estate. We believe it sufficient to say that the possibility of reduced tax collections has not deterred Texas from spending, according to its papers, seventeen months of intense preparation and, doubtless, hundreds of thousands of dollars for the Texas domicile trial. Nor will the pendency of the will contests deter California from

federal estate tax return of $12,675,000 for administrators' and attorneys' fees, the maximum amount deductible under California law for these purposes (at the same valuation) would be $3,407,662.00. Extraordinary costs of administration, such as sales and maintenance expenses and interest, are also nondeductible in California although the estate claimed a deduction on its federal return of $18,082,207.00 for such costs. 18 CALIF. ADMIN. CODE § 13988(g). The remaining difference results primarily from California's unwillingness to permit deduction of disputed federal tax claims against the estate, due to their contingent nature. *Id.* § 13983(d).

taking the necessary steps to assess and collect its asserted tax. Because the Texas trial will determine both the question of domicile for inheritance tax purposes *and* the validity of the Mormon will, a decision by this Court which forces California to await resolution of the Mormon will controversy—not to mention resolution of the "lost will" claim—would necessarily compel California to await a final judgment of the Texas courts on Texas' entitlement to levy its inheritance tax before taking steps to protect against the possibility of such a judgment. Under the circumstances, California was not obliged to defer initiating this proceeding until *after* completion of the Texas trial.[6]

Moreover, Texas is simply wrong in assuming that the admission to probate of the Mormon will would eliminate the risk that California would be unable to collect the death taxes due it. To the contrary, although the net amount of tax would be reduced because a portion of the estate would go to charity and would therefore not be taxed, the tax on the non-charitable bequests would apparently have to be satisfied solely out of that portion of the estate going to the non-charitable beneficiaries. That non-exempt portion of the estate would be exceeded by the aggregate tax claims resulting from those bequests. In other words, if the estate were worth $300,000,000, and $200,000,000 were left to charity, the taxes on the non-charitable bequests of $100,000,000

6. Indeed, if California *were* to have deferred initiating this action until such contingencies as these were eliminated, Texas would undoubtedly have contended that California had waited too long and was barred by laches. Such a suggestion was made by Texas in its Response to Application for Temporary Restraining Order and Preliminary Injunction (see pp. 2-3). While that contention was without merit and now has apparently been abandoned, a proceeding in the nature of interpleader not initiated until *after* one of the claimant states has obtained a final judgment could well be regarded as untimely.

would have to be recovered from the non-charitable beneficiaries and would exceed the amount devised to them.[7]

Finally, Texas complains (Tex. Br., at 16) that California has failed to allege that the "local assets" of the estate are insufficient to satisfy its tax claims. Though easily and truthfully made, such an allegation would be unnecessary and irrelevant for several reasons. First,

7. The statement in the text results from three factors:
First, as the Mormon will contains no tax allocation clause, the burden of the federal estate tax—which has priority over state tax claims (see 31 U.S.C. § 191)—would under California law be allocated to the non-charitable beneficiaries. See CALIF. PROBATE CODE § 970; *Estate of Buckhantz*, 120 Cal. App.2d 92, 101 (1953).
Second, the Texas inheritance tax is a tax on succession which falls on the beneficiary, not the estate as a whole. *Norton v. Jones*, 210 S.W.2d 820 (Tex. Civ. App. 1948). Thus any tax collected by Texas would be collected from the assets passing under the will to the non-charitable beneficiaries and not from the charitable beneficiaries which, of course, are exempt from payment of tax. TEX. TAX-GEN., Art. 14.015(2)
Third, the California inheritance tax is likewise imposed upon the transferee's right of succession, not on the estate as an entity. *Estate of Setrakian*, 169 Cal.App.2d 795 (1959). The inheritance tax rates thus vary according to the relationship between the decedent and the beneficiary. See CALIF. REV. & TAX CODE §§ 13404, 13405 and 13406. The administrator or executor is authorized to deduct the tax due on each transfer from the property given to the transferee or, if the property transferred is not money, to collect the tax from the transferee before distributing the property. CALIF. REV. & TAX CODE § 14121. But nothing in the Revenue & Taxation Code authorizes the personal representative to pay one person's inheritance tax out of property bequeathed to another, for the tax is not imposed on the estate, but on the transferee, and the representative is merely the agent of collection. *Cohn v. Cohn*, 20 Cal.2d 65, 67-68 (1942). Moreover, the statutory inheritance tax lien is imposed not on the entire property of an estate, but only on "the property included in the transfer on which the tax is imposed." CALIF. REV. & TAX CODE § 14301. Thus, the property going to the charitable beneficiaries under the "Mormon Will" would be free and clear of the statutory tax lien and the executor would be under no legal duty to surrender that property to the state in satisfaction of the tax liabilities of non-exempt beneficiaries.

approximately 61% of the estate will go in any event to the federal government, which is obviously indifferent as to whether the assets from which it is paid are located in Texas, California or elsewhere. Under federal law (31 U.S.C. § 191), the federal tax claim has priority over state tax claims and it is simply impossible at this juncture to predict the legal situs of the balance of the estate which will be left after the federal tax claim is satisfied. Second, as Texas admits (Tex. Br., at 12), the "majority of the assets" in the estate consists of the Summa stock which is intangible and whose legal situs is deemed to be the state of Mr. Hughes' domicile. Should Texas secure a judgment in its own courts—in which the interested heirs have personally appeared—that it is entitled to levy an inheritance tax based upon domicile, it will be able to enforce that judgment in any forum, including the courts of California. *Riley v. N.Y. Trust Co.*, 315 U.S. 343, 349-50 (1942). Thus such assets as are located in California might well be used to satisfy either the federal or the Texas tax demands. Finally, as Texas well knows, the tangible assets of the estate located in California are nominal.[8] The undeveloped land in California which Texas asserts is sufficient to satisfy California's tax claims (Tex. Br., at 16) is owned by Summa and not the estate. Unless California could establish that Summa and Hughes were *alter egos* (*see* p. 25, *infra*), this property could not be reached by California in execution of any judgment for inheritance taxes.

In short, Texas has invited this Court to join in its speculations about various contingent events which *might*

8. The Estate has filed an inventory in the Los Angeles Superior Court reporting that the total value of the tangible assets situated in California is approximately $145,000, obviously a negligible percentage of the Hughes estate however its assets are ultimately valued.

obviate the conditions which presently jeopardize California's ability to enforce its inheritance tax laws and which bring it into conflict with the state of Texas. These speculations are unauthorized by *Texas v. Florida,* which requires only a showing of a substantial risk that the California tax cannot be collected. In all events, they cannot obscure the harsh reality of a grave risk that this massive and complex estate will be met with conflicting tax claims and will be unable to pay the tax due to California. The Complaint alleges tax claims totalling 142% of the estate's assets, based upon the values reported by the estate. Although Texas posits hypothetical circumstances which could reduce this shortfall, the Complaint alleges (¶ 15) that the estate is suffering severe losses, even as substantial amounts of interest accrue, all of which only increase the deficit. If this case is not within the original jurisdiction of the Court established in *Texas v. Florida,* no case could be.

B. Texas v. Florida Represents a Classic Exercise of This Court's Power to Decide Jurisdictional Disputes Between States and Should Not Be Overruled.

In Part III of its brief, Texas contends that *Texas v. Florida* represents "a singular intrusion upon the exclusive jurisdiction of the various states to administer a decedent's local property" because, it is said, "a state has 'full and absolute dominion' over property within its borders". Tex. Br., at 22 (citation omitted). In its view, *Texas v. Florida* "constitutes a highly questionable exercise of this Court's original jurisdiction" (*id.,* at 19) because the Court (albeit at the instance of none other than the State of Texas) improperly invaded the established domain of the states; Texas urges that *Texas v. Florida* should not be "extended" here. Because this case is indistinguishable from *Texas v.*

Florida,[9] the argument amounts to nothing less than an entreaty that it be overruled. While one might expect greater consistency from the state which successfully invoked the Court's jurisdiction in that case (and, of course, in *Texas v. New Jersey,* 379 U.S. 674 (1965) as well), it requires little to show that Texas' argument proceeds from a demonstrably erroneous premise.

That premise is that the assets of the estate are "local property" over which Texas has undoubted jurisdiction. Tex. Br., at 22. This would be true were the estate composed primarily of real and tangible personal property, but it is not; it is composed largely of the shares of Summa Corporation, which of course constitute intangible assets which for death tax purposes are deemed to have the situs of the decedent's domicile. See 8 DEL.C. § 169. Texas can state that these shares are "local property" which is "in" Texas only by assuming a favorable resolution to the very controversy at issue between California and Texas.

Because the assets of the estate are insufficient to satisfy both claims, this case is no different in principle from disputes involving boundaries, navigable waters and the like where two states have asserted conflicting and contra-

---

9. The claimed "extension" upon which Texas relies rests on the assertion that "all states in *Texas v. Florida* were apparently willing to have this Court adjudicate matters of their local law." Tex. Br., at 25. But the alleged failure of the defendants to contest jurisdiction in that case in no way affects the determination of California's motion or differentiates the two cases, for it is settled law that the failure of a defendant to object to jurisdiction does not avoid the issue of whether jurisdiction exists; the consent of the parties cannot confer jurisdiction. Indeed, in *Texas v. Florida,* the Court raised the matter of its jurisdiction *sua sponte* despite the lack of jurisdictional exceptions to the report filed by the Special Master. *Texas v. Florida, supra,* at 405. Since a party's affirmative assent cannot create jurisdiction, *a fortiori,* a party's objection to well-founded jurisdiction cannot destroy it. The claimed distinction between this case and *Texas v. Florida* is therefore without merit.

dictory jurisdictional claims over the same subject matter. The Hughes estate is legally indistinguishable from a river over which two states assert jurisdiction; both cannot prevail, and only this Court can settle the controversy in accordance with its constitutional mandate. Only by dissembling can Texas contend that, in *Texas v. Florida,* "there was no question concerning the location of the various assets of Colonel Green's estate and thus no dispute as to which state could exercise *in rem* jurisdiction in the distribution thereof." Tex. Br., at 20. *Texas v. Florida* would have been an academic exercise if determination of the domicile controversy had not fixed the legal situs of the intangible assets of the Green estate and thus ended the dispute as to which state had taxing jurisdiction.

Similarly, Texas finds "highly questionable" the "jurisdictional basis of *Texas v. Florida* . . . that only one state could properly tax the estate" (Tex. Br., at 24), in light of modern mobility and the many potential jurisdictional bases for state taxation. Anyone remotely familiar with the life of the well-travelled Col. Green (see *Texas v. Florida, supra,* at 414-23; see also LEWIS, THE DAY THEY SHOOK THE PLUM TREE (1963)) could scarcely regard that case as an anachronistic relic of a less mobile day. In any event, if Texas means that assets in an estate may permissibly be subjected to multiple taxation on different bases, we do not disagree; this, of course, was established by *Graves v. Elliott*, 305 U.S. 667 (1938), *Curry v. McCanless,* 307 U.S. (1939) and *State Tax Commissioner v. Aldrich,* 316 U.S. 174 (1942), the first two of which were decided contemporaneously with *Texas v. Florida* and cited in that opinion. Thus, the post-mortem transfer of the Summa shares which form the major part of the estate's assets could presumably be taxed both by the state of Mr.

Hughes' domicile and the state of Summa's incorporation. But the critical fact is this case, as in *Texas v. Florida* (see 306 U.S., at 408), is that the contending states are asserting taxes on the *same* conceptual basis—domicile—and not on other, possibly available grounds. Whether Texas could constitutionally tax the Hughes estate on the basis of the alleged benefits it provided Mr. Hughes during his life is simply not an issue in this case, for Texas has not chosen to assert such a tax. Rather, it has sought to collect a tax on the basis of Mr. Hughes' domicile, as has California, and the two conflicting domicile claims, which cannot both be satisfied, clearly create an inter-state controversy requiring this Court's adjudication.

Although Texas seeks to characterize *Texas v. Florida* as outmoded, the only relevant development since *Texas v. Florida* confirms the jurisdictional path identified in that case. In *Western Union v. Pennsylvania*, 368 U.S. 71 (1961), a Pennsylvania court had determined that abandoned funds in the possession of a corporation doing a nationwide business should be escheated to Pennsylvania despite conflicting claims of at least one other state. This Court, reversing, held that due process forbids such a course "unless the Pennsylvania courts had power to protect [the stakeholder] from any other claims." *Id.*, at 75. As the other states were not bound by the Pennsylvania judgment (and could not be made parties to the Pennsylvania proceedings, see 368 U.S., at 75), this requirement could not be satisfied. Thus, the Court concluded (citing *Texas v. Florida*), a state seeking to escheat funds claimed by more than one state must proceed under this Court's original jurisdiction; due process precludes an adjudication in the state courts.

Where the taxes claimed exceed the total net estate, separate adjudications deprive the transferees of the protection, which under *Western Union* due process arguably

assures, against inconsistent adjudications of liability. This seems especially so where, as is ordinarily the case in inheritance taxation, both the transferee and the personal representative are personally liable for payment of the inheritance tax—in this instance a liability which exceeds the amount inherited. See CALIF. REV. & TAX CODE § 14101b;[10] TEX. TAX-GEN. ANN. Art. 14.18(c) (Vernon); see generally CCH INHERITANCE, ESTATE AND GIFT TAX REPORTER ¶ 2030B. That factor underscores the parallel to *Western Union*: there an inconsistent adjudication would mean that the stakeholder was unprotected against a total liability which exceeded the funds held by it; here, an heir could be liable to more than one taxing authority for inconsistently imposed taxes in excess of the amount inherited.

Western Union seems to us to mean that once a state is on notice of multiple tax claims which subject the estate and the heirs to inconsistent liabilities in excess of the estate's assets, its state courts may not adjudicate the tax claim in a proceeding which does not bind the other claimants; rather, the state *must* invoke the original jurisdiction of this Court. That is what California has done here, and it is ironic that Texas now argues that the invocation of jurisdiction—which *Western Union* suggests was obligatory—was somehow inappropriate.[11]

---

10. In California, for example, the Controller is empowered to enforce the transferee's personal liability by levying a writ of execution upon *any* property of the transferee and not simply the inherited property which gave rise to the tax liability. CALIF. REV. & TAX CODE § 14322.

11. Necessarily, it follows that in such a setting, as in the escheat case, exercise of this Court's original jurisdiction is virturally obligatory, for any other procedure "denie[s] . . . due process of law because it could not protect [the administrator and heirs] against rival claims of other States." *Pennsylvania v. New York*, 407 U.S. 206, 209 (1972).

Finally, it bears mention that in the forty years since *Texas v. Florida* was decided, no flood of inheritance tax-domicile litigation has burdened this Court as a consequence. Many states—though not Texas—have enacted mandatory arbitration statutes for the resolution of such controversies. *See, e.g.* CALIF. REV. & TAX. CODE §§ 14199-14199.13. Careful estate planning doubtless plays a part in avoiding the problem in the first instance. And, presumably, states and estates resolve by settlement most of the controversies which do arise and which otherwise could come to this Court. *Texas v. Florida* provides a sound and necessary remedy for the exceptional case. This is such a case.

C. The Abstention Doctrine Is Inapplicable to This Case Because There Is No Alternative Forum Where California's Claims May Be Determined.

In the concluding section of its brief (pp. 25-30), Texas contends that the doctrine of abstention compels the denial of California's motion and, implicitly, the overruling of *Texas v. Florida*. This contention is founded on the same faulty premise as Texas' argument regarding the "singularity" of *Texas v. Florida*—that assumption of jurisdiction by this Court would interfere with Texas' power over assets undeniably local in character—and should be rejected for the same reasons. See pp. 12-14, *supra*. Even if this were not true, however, there are additional and compelling reasons why the abstention doctrine is wholly inapplicable to California's motion.

At the outset, we note that Texas' concern for the rights of states (Tex. Br., at 25-26) is wholly misplaced. California is also a state, and no less than Texas has substantial interests at stake. The concern for federalism which has led this Court to inhibit the power of federal courts to inter-

fere with state court proceedings by states against their own citizens is in no way implicated when one state seeks relief against another. States are co-equal sovereigns; a state and its individual citizens are not. It is the essence of our federal structure that controversies between co-equal states be resolved, not by courts of one of the contestant states, but by this Court.

The inapplicability of either *Pullman* or *Younger*-type abstention is apparent when one recognizes that there simply is no state tribunal to which California should or could resort if this Court were to decline to entertain this action. State courts have no more jurisdiction over controversies within this Court's exclusive jurisdiction than the lower federal courts. *Friedberg v. Santa Cruz* 86 N.Y.S.2d 369, 274 App. Div. 1072 (1949); *De Miglio v. Paez,* 189 N.Y.S.2d 593, 18 Misc.2d 914 (1959). As the Court recently noted in *Ohio v. Wyandotte Chemicals Corp.,* 401 U.S. 493 (1971), a central purpose underlying the grant of original jurisdiction to this Court is that "no state should be compelled to resort to the tribunals of other states for redress . . . ." *Id.,* at 500. California can only litigate its dispute with Texas here.

Texas does not, of course, suggest that California is obliged to appear in the Texas courts to litigate its domicile claim, nor has it offered to appear in the California proceedings. Rather, it offers the remarkable observation that "Delaware provides an alternative and more effective forum 'in which the issues tendered here may be litigated'." Tex. Br., at 29. The suggestion that California, after securing a favorable inheritance tax judgment in its own courts, could and should then proceed to relitigate the domicile controversy in the courts of Delaware is without merit. The Delaware court would then have before it an action to determine whether the tax liens of California and Texas on the stock

of Summa are valid as against the heirs and the estate. It could not do as Texas suggests and re-determine the tax judgments of Texas and California; rather, it would be obliged to give full faith and credit to each state tax judgment rendered against the heirs who were parties thereto. See *Texas v. Florida, supra,* at 410.[12]

The conclusion is inescapable that there is no alternative forum in which California can present its claims, and certainly none in which it should be required to proceed. The denial by this Court of California's motion for leave to file its complaint would leave California helpless to prevent

---

12. Admittedly, Texas would not be bound by the California judgment because it would not have been a party to it; and for the same reason California would not be bound by the Texas judgment. But the judgment of each state court would run against the estate and the heirs and those litigants could not re-litigate the judgments because of the command of the full faith and credit clause. Nor could California itself attack the Texas judgment, for that would be a controversy between states beyond the jurisdiction of the Delaware court.

Indeed, Texas' suggestion that Summa's interpleader action in the Delaware courts provides a "more effective forum" (Tex. Br. at 29) to litigate the domicile controversy between California and Texas is startling in view of the fact that Texas' response to being named as a defendant in that action was to move to dismiss for lack of jurisdiction. In that motion, filed on behalf of the Texas Comptroller, the Texas Attorney General contended, *inter alia,* that neither Texas nor the Texas Comptroller could be subjected to suit in the courts of another state without legislative consent, due to the doctrine of sovereign immunity. The motion is still under submission in the Delaware courts. Whether a Delaware court could exercise personal jurisdiction over the State of Texas or its taxing officials, which presumably transact no business there, is a question which Texas does not even pose, let alone answer. And after *Shaffer v. Heitner,* ..... U.S. ....., 53 L.Ed.2d 683 (1977), the fact that the interpleader action concerns shares in a Delaware corporation which Delaware deems to have a Delaware domicile does not establish jurisdiction over defendants who otherwise have had constitutionally insufficient contact with the forum.

For all these reasons, it is evident that in all probability California could not litigate the validity of the Texas tax judgment against Texas or the estate in the Delaware court, even if it desired to do so—which it does not.

Texas from depleting the estate of assets which will, in all likelihood, be necessary to satisfy California's legitimate tax claims. Abstention is therefore inappropriate.

II.

CALIFORNIA IS A REAL PARTY IN INTEREST WHICH SEEKS RELIEF FOR ITS OWN BENEFIT AND THUS HAS STANDING TO INVOKE THIS COURT'S ORIGINAL JURISDICTION.

The proposed Complaint alleges that this suit was initiated "on behalf of the State of California to protect its statutory inheritance tax lien on decedent's estate . . . and not on behalf of the estate or any other person or entity." Complaint ¶ 17. Nevertheless, Texas contends that this action has been brought "on behalf of the [Hughes] estate and thus is not within this Court's original jurisdiction." Tex. Br., at 10. This is so, Texas charges, because the Provisional Settlement Agreement between California and the estate[13] is a collusive one (*id.*, at 11) which disentitles California to invoke the Court's jurisdiction. These assertions are legally and factually incorrect.

That the Provisional Settlement Agreement between California and the estate does not cast doubt upon—and, if anything, enhances—this Court's jurisdiction is readily apparent upon a consideration of its terms.

The Provisional Agreement, in essence, seeks to resolve the potential controversy between California and the estate. In it the estate (and the heirs) agreed to pay an inheritance tax to California (at a compromise rate of 18%) in resolution of the dispute between them as to whether Hughes was a domiciliary of California or Nevada. But because the estate was understandably unwilling to pay such a tax to

13. A copy of the Provisional Settlement Agreement was lodged with the Court by California in connection with the prior application for a preliminary injunction and is now reprinted in the Appendix to the Texas Brief in Opposition.

California if Texas will also be able to levy a 16% tax, the Provisional Settlement is conditioned upon a determination, binding upon both Texas and California, of whether Texas is entitled to assess a domicile-based inheritance tax. (Agreement, ¶ 1).

As shown in the previous section, absent the Agreement, there is undeniable jurisdiction to resolve the dispute between California and Texas. If this Court were to regard the Provisional Settlement Agreement as somehow impairing that jurisdiction and accordingly declined to allow its exercise, then, under Paragraph 1, the Settlement would be nullified and the basis for jurisdiction would be restored. Accordingly, the Settlement does not affect the existence of a live controversy and casts no doubt on the Court's jurisdiction. *Cf. Zablocki v. Redhail,* .....U.S....., 46 U.S.L.W. 4093, 4096 n.9 (1978) (enactment of new statute, applicable only if and to the extent old statute enjoined by any court, does not moot challenge to old statute because if old statute upheld, new statute will cease to be effective).

It passes beyond the borders of reality to suggest this is a suit "brought in the name of a state but for the benefit of individuals." Tex. Br., at 8. California is plainly the real party in interest in this litigation. California, not the estate, will receive whatever monetary benefits result from this action and its claims are premised on its power as a sovereign to tax the transfer of property of its domiciliaries at death. It is absurd to suggest that California, which seeks to impose on the estate severe inheritance taxes, is acting for the estate's benefit. This action clearly serves California's fiscal interests and was initiated solely for that purpose. California has no interest in protecting the estate or the heirs (most of whom do not even reside in California) and has no reason to act for their benefit.

We do not deny that the initiation of this suit may nevertheless be of indirect benefit to the estate to the extent that it eliminates the risk to it of double taxation. But this suit indirectly benefits the estate in no way not equally present in *Texas v. Florida.* The fact that a third party may receive an indirect benefit from the invocation of this Court's jurisdiction is legally irrelevant to the question of whether original jurisdiction has been properly invoked. *South Dakota v. North Carolina,* 192 U.S. 286, 310 (1904) (jurisdiction of this Court held unaffected by fact that plaintiff state, which held bonds issued by defendant state, received those bonds as a donation from an individual bondholder who hoped to benefit from the donee state obtaining judgment on the bonds).[14] The point is that California had real and substantial interests of its own to protect, and those interests are the basis for this suit.

14. That fact that California will reap the direct benefits which result from this litigation differentiates this case from the authorities cited by Texas (*New Hampshire v. Louisiana,* 108 U.S. 76 (1883), *Kansas v. U.S.,* 204 U.S. 331 (1907), and *Oklahoma ex rel. Johnson v. Cook,* 304 U.S. 387 (1938)). In each of those cases, the State was merely the nominal plaintiff, while the direct benefits of litigation accrued to private third parties—a bondholder, a railroad company and the creditors and depositors of a bank, respectively. In none of those cases would the State, even if successful, have derived any benefit from the litigation. Thus, in *New Hampshire v. Louisiana, supra,* a New Hampshire statute permitted private individuals holding delinquent bonds issued by other states to assign the bonds to the State for collection, authorized the state Attorney General to sue on the bonds in this Court upon payment of expenses by the bondholders and provided that the bondholders would recover any sums collected by suit or recovered through compromise or settlement. *Id.* at 76-77. The Court declined to accept jurisdiction, holding that the lawsuit was "under the actual control of individual citizens, and . . . prosecuted and carried out altogether by and for them." *Id.* at 89. By contrast, where a state had full title to bonds issued by another state, even though the bonds had been donated by a private bondholder, suit between the states to recover on the bonds was held to be within the Court's original jurisdiction. *South Dakota v. North Carolina,* 192 U.S. 286 (1904), discussed at p. 27, *infra.*

While Texas claims that the agreement reached between California and the estate is offensive to the "mandates of conscience and good faith" (Tex. Br., at 11), it fails to explain why this is so. The nearest it comes is to assert that the Provisional Settlement Agreement may permit California to recover a tax (albeit at a compromise rate) without a judicial finding that California was the state of domicile. Tex. Br., at 10. Texas overlooks the fact that the very purpose of a settlement is to enable a party to recover less than the full value of its asserted claim without the necessity of subjecting that claim to the rigors of a full-fledged trial or securing a favorable factual determination thereon. Because it is often difficult to tie together the conflicting strands of a person's life into a single thread of domicile, many states, including both California[15] and Texas,[16] provide their taxing authorities with power to compromise death taxes in the event of a dispute as to domicile. See CCH INHERITANCE, ESTATE AND GIFT TAX REPORTER ¶ 12,035. There is nothing about the agreement reached between California and the estate which renders it different in principle from any other compromise of a dispute between a taxing authority and a taxpayer; indeed, the Provisional Agreement is founded on the mutual recognition that California and the estate could readily have reached a complete and unconditional settlement in the absence of Texas' competing claim.[17]

15. CALIF. REV. & TAX CODE § 14191.

16. TEX. TAX-GEN. Art. 14.13.

17. Were Texas truly concerned—as it claims to be—with deterring agreements between "states with weak inheritance tax claims and high inheritance tax rates" and wealthy estates (Tex. Br., at 11), it would have enacted, as California has done, a statute enabling an administrator or executor of an estate facing multiple tax liability based on conflicting claims of domicile to force the competing states to arbitrate the domicile issue, thus limiting the estate's potential exposure to one of the competing claims. See CALIF. REV. & TAX CODE § 14199.1.

Far from being offensive to the conscience, the Provisional Settlement serves the salutary function of narrowing and confining the issues in dispute between California and Texas should the Court accept jurisdiction. A controversy which began as involving several possible domiciles has been substantially narrowed, there remaining only the contention of Texas that Hughes was domiciled there. As a result, the Court will not be required to determine the actual state of domicile once it has found Texas' claim to be without merit; the compromise of the interested parties renders that unnecessary. In reviewing a life that spanned at least three states and several foreign countries, that cannot be said to be an insignificant or inappropriate saving of judicial time and energy. Moreover, the Provisional Agreement insures that the only parties who need appear before the Court are the two contesting states; the Agreement has, for purposes of death taxation, resolved the conflicting domicile claims of the numerous heirs who have asserted an interest in the Hughes estate. The result, again, is to spare the Court the cacophony of voices and claims which this litigation would otherwise have presented.

The assertion that the Provisional Settlement Agreement is collusive is preposterous. To state that it reflects an agreement between the parties who signed it merely identifies the obvious. Surely the policy of the law encourages settlements short of litigation. See *Bordenkircher v. Hayes*, ... U.S. ....., 46 U.S.L.W. 4089 (1978). And nothing in the Agreement in any way renders less than adversary the controversy between California and Texas. Indeed, the Agreement does not even address the single issue which this Court is asked to adjudicate: whether Hughes was a domiciliary of Texas for death tax purposes. Should Texas

obtain a judgment from this Court that it is the state of domicile, it will receive every penny of tax to which it is legally entitled under its statutes. As clearly noted, the Provisional Settlement merely undertakes to resolve a dispute, in which Texas is not involved, between California and the estate as to whether, after Hughes became a Californian, he thereafter moved his domicile to Nevada.

Nor can some sinister and collusive significance be attached to the provision of the Agreement (¶ 5) which provides for payment of an approximately two percent tax if Texas is found to be the state of domicile. Indulging itself with unsupportable rhetoric, Texas characterizes this as an agreement "to pay California two percent (2%) . . . regardless of the merits of California's claim, in return for its obtaining a domicile determination by this Court." Tex. Br., at 10. This allegation is entirely without basis. The Agreement states that such payment is to be "in full settlement and compromise of all death tax claims which could be asserted by it even if Decedent were not a domiciliary of California." Among other things, such payment would be in settlement and compromise of California's contention that Summa Corporation was the *alter ego* of Hughes and that its substantial real property and tangible personal property situated in California are therefore properly the subject of California death taxes without regard to domicile.[18]

---

18. Nor do the events which led to the filing of this action support Texas' charge of collusion. We have already filed with the Court a declaration showing that California advised Texas of its intention to file suit in this Court two weeks before the commencement of negotiations leading to the Provisional Agreement (Declaration of Jerome B. Falk, Jr. filed in conjunction with California's Reply to Response to Application for Temporary

The very most that Texas could properly say of the Provisional Settlement is that it is irrelevant to the question of jurisdiction under *Texas v. Florida*. As we have shown, it does no more than resolve part of the domicile question in dispute—an aspect with which Texas should be unconcerned—and leave for adjudication in this Court the controversy involving Texas' claim of domicile. But in reality the Provisional Settlement *enhances* California's interest in this controversy and California's entitlement to invoke the jurisdiction of this Court.

Absent the Provisional Settlement, California would have stood in this Court, as did Texas in *Texas v. Florida*, as a claimant advancing one of several possible domicile claims. The Court might have found Hughes to be a domiciliary of Nevada, Texas, California, Mexico, the Bahamas—to name only the most likely possibilities. In that setting, California might well have defeated the claim of Texas but failed to prevail against some other possible domicile. In short, California's interest—while sufficiently substantial to warrant such a litigation—was far from certain.

The Provisional Settlement Agreement substantially alters the picture and materially enhances California's stake in the controversy between it and Texas. If the domicile claim of Texas can be defeated, California is assured

---

Restraining Order For Preliminary Injunction); that declaration has gone unchallenged here.

We find especially offensive the suggestion that an understanding between counsel for California and counsel for the estate, whereby the estate's counsel agreed to make available deposition transcripts, pleadings, and other documents potentially relevant to this litigation, should be regarded as collusive. Texas surely does not favor the suppression of relevant evidence, nor can it plausibly suggest that every request for the production of documents must be met with a demand that the requesting party obtain a subpoena.

under the Agreement that the estate will pay an 18% tax to it.

Because this Court would undeniably have jurisdiction under *Texas v. Florida* even in the absence of the Provisional Settlement (see Part I, *supra*), we are not obliged to rely on it as the basis for invocation of jurisdiction. But it is plain that, far from defeating jurisdiction, the Provisional Settlement underscores it. In that regard, this case is *a fortiori* from *South Dakota v. North Carolina*, 192 U.S. 286 (1904). There the holder of bonds issued by North Carolina gave a small fraction of those bonds to South Dakota advising it, in his letter of transmittal, of its right to sue North Carolina on the bonds and promising to make "additional donations" to the state if it were successful in obtaining judgment. *Id.*, at 290. In accepting jurisdiction, this Court squarely held that, as South Dakota held full title to the bonds at the time the suit was instituted, it was irrelevant that its claim arose from a donation or sale by a private party. *Id.*, at 312.

If a state originally having no claim of its own may invoke the jurisdiction of this Court by procuring a cause of action from an individual third party, that jurisdiction is certainly not impaired when California, which already possessed a claim against Texas, enhances its interest in that claim by virtue of a settlement agreement with the estate. At the outset of its brief, Texas propounds the rhetorical question whether a state's claim "based upon a contract with private parties provide[s] an adequate basis for the exercise of this Court's original jurisdiction" (Tex. Br., at 1); despite the inaccuracy of the question as a description of the issues raised by California's motion, *South Dakota v. North Carolina* holds that it does. And in all

events, for present purposes it is enough to say that such a contract does not defeat pre-existing jurisdiction.[19]

DATED: February 3, 1978.

Respectfully submitted,

MYRON SIEDORF
JAMES R. BIRNBERG

JEROME B. FALK, JR.
STEVEN L. MAYER
HOWARD, PRIM, RICE, NEMEROVSKI,
CANADY & POLLAK
A Professional Corporation

Attorneys for Plaintiff

19. Through a printer's error, one figure in Appendix "A" to the Complaint is erroneous, that for the total California tax. The table shows $26,128,129.00, while the correct figure is $32,195,010.00. The total figure for state and federal taxes in Appendix "A" is correct, as are the figures set forth in the Complaint and supporting memorandum. This error will be corrected in the copy of the Complaint filed with this Court and served upon Texas should the motion for leave to file be granted.

Appendix A

Excerpt from Affidavit of Milton H. West, Jr.
In the Court of Chancery of the State of Delaware
in and for New Castle County
Civil Action No. 5058, 1976

FILED
JAN. 9 '77
COURT OF CHANCERY
JOHN D. KELLY III

SUMMA CORPORATION, a Delaware corporation,
Plaintiff,
v.
FIRST NATIONAL BANK OF NEVADA, et al.,
Defendants.

THE STATE OF DELAWARE
COUNTY OF NEW CASTLE—ss.

Milton H. West, Jr., being duly sworn according to law, does depose and say that:

1. He is a partner in the law firm of Andrews, Kurth, Campbell & Jones ("Andrews, Kurth") and that his firm has rendered legal services on behalf of Howard R. Hughes, Sr. and Howard R. Hughes, Jr. ("HRH") since shortly after the turn of the century.

* * *

37. The net operating income (or loss) of Summa (with the exception of that of the Oil Tool Division which was sold in 1972) has been as follows:

1971	$(40,574,000)
1972	(21,834,000)
1973	(15,228,000)
1974	(2,005,000)
1975	(29,692,000)
1976 (first 9 months)	(22,466,000)
Total	$(131,799,000)

MILTON H. WEST, JR.
Milton H. West, Jr.

Sworn to before me this 16th day
of June, 1977.

RICHARD S. PAGE
Notary Public